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In the

Supreme Court of the United States

OCTOBER TERM, 1984

NO.

ARKANSAS PUBLIC SERVICE COMMISSION;
ROBERT E. JOHNSTON, COMMISSIONER;
PATRICIA S. QUALLS, COMMISSIONER;
and JAMES W. DANIEL, COMMISSIONER,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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10 pp

QUESTIONS PRESENTED FOR REVIEW

Congress mandated, in the express language of the Communications Act of 1934, that jurisdiction over telecommunications be divided between the federal government and the states. The Federal Communications Commission (F.C.C.) was granted authority over interstate and international communications, 47 U.S.C. §151, while authority over the intrastate activities was clearly reserved to the states, 47 U.S.C. §§152(b) and 221(b). On January 6, 1983, the F.C.C. issued a *Memorandum Opinion and Order* which reversed its fifty year old interpretation of the Communications Act and announced it was preempting state regulation of intrastate depreciation methods. 92 F.C.C.2d 864 (1983). Against this background, the questions presented are as follows:

1. Whether the F.C.C.'s *Memorandum Opinion and Order* purporting to preempt state regulation of intrastate depreciation methods is ultra vires as a patent violation of the Communications Act of 1934;

2. Whether a district court has jurisdiction and discretion to refuse to enforce an ultra vires action of the F.C.C.; and

3. Whether the F.C.C.'s *Memorandum Opinion and Order* is enforceable in a district court as an "Order" within the meaning of 47 U.S.C. §401(b).

PARTIES

The parties to the proceeding before the U.S. Court of Appeals for the Eighth Circuit are listed below.

Arkansas Public Service Commission;
Robert E. Johnston, Commissioner;
Patricia S. Qualls, Commissioner;
and James W. Daniel, Commissioner

Southwestern Bell Telephone Company

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SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Arkansas Public Service Commission (A.P.S.C. or Arkansas Commission) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on June 7, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is attached at Appendix, p. A-43. The opinion of the United States Court of Appeals for the First Circuit is attached at Appendix, p. A-56. The opinion of the

United States District Court for the Eastern District of Arkansas, Western Division, is attached at Appendix, p. A-34, and was not reported. The *Memorandum Opinion and Order* (Preemption Ruling) of the Federal Communications Commission (F.C.C.) is reported at 92 F.C.C.2d 864 (1983), and is attached at Appendix, p. A-1.

JURISDICTION

The decision of the Eighth Circuit Court of Appeals was entered June 7, 1984. The Arkansas Public Service Commission's Petition for Rehearing en banc was denied on July 3, 1984. This petition was filed within ninety days of the denial of the Petition for Rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth at Appendix, pp. A-71 through A-74.

STATEMENT OF THE CASE

On April 27, 1982, the F.C.C. formally announced what had been its undisputed policy since the passage of the Communications Act of 1934 (Communication Act or Act). In a *Memorandum Opinion and Order* the F.C.C. stated that state regulatory commissions are not preempted by the F.C.C. from adopting depreciation methods for purposes of intrastate ratemaking which are inconsistent with methods approved by the F.C.C. 89 F.C.C.2d 1094 (1982) (April 27 Order). In the April 27 Order the F.C.C. reviewed the Communications Act, its legislative history, and years of case law, and concluded that there was no clear Congressional intent to preempt inconsistent state prescription of depreciation rates, and further concluded that such state regulation would not frustrate or conflict with valid federal policies.

Nine months later, in a rulemaking proceeding, the F.C.C. reversed this position and concluded that the language and legislative history of 47 U.S.C. §220(b), coupled with its authority to preempt state actions that interfere with federal policies, empowered it to preempt inconsistent state depreciation policies and rates. *Memorandum Opinion and Order*, 92 F.C.C.2d 864 (1983) (the Preemption Ruling). The Preemption Ruling applies Equal Life Group and Remaining Life depreciation methods to intrastate rates and preempts the adoption of contrary methods by state commissions.

In March 1983 Southwestern Bell Telephone Company (Bell or Southwestern Bell) filed an application for a rate increase with the A.P.S.C. for its intrastate services. Part of its request was based on the increased depreciation expenses resulting from the F.C.C.'s Preemption Ruling.

The Arkansas Commission rejected this portion of Bell's application and stated that the F.C.C.'s purported preemption of the A.P.S.C.'s authority over the setting of

intrastate depreciation methods was unlawful. The A.P.S.C. approved a different depreciation method, the Whole Life method.

Bell initiated the state administrative remedy of requesting a rehearing before the A.P.S.C. on this issue. Ark. Stat. Ann. §73-229.1 (Repl. 1979). The A.P.S.C. set a date for rehearing. In the interim, Bell filed a complaint in federal district court. Bell subsequently withdrew its request for rehearing before the A.P.S.C.

The complaint alleged federal court jurisdiction under 28 U.S.C. §§1331 and 1337, as well as 47 U.S.C. §401(b), and sought declaratory and injunctive relief to compel the A.P.S.C. to abide by the F.C.C. mandated depreciation methods. Bell alleged that the Preemption Ruling was an "Order" (as opposed to rulemaking) and was enforceable by a private party against a state commission under §401(b).

The District Court denied relief holding that the Preemption Ruling is ultra vires because the F.C.C. lacks jurisdiction to preempt state authority over depreciation methods used for intrastate ratemaking. The court also denied injunctive relief under 47 U.S.C. §401(b) on the ground that an ultra vires ruling cannot be "regularly made" within the meaning of that statute. Finally, the court reviewed Bell's request for injunctive relief under the traditional equitable criteria. *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981). It held that Bell failed this standard for two reasons: (1) it had no probability of success on the merits because the F.C.C. ruling is ultra vires and (2) the public interest factor weighed heavily on the side of the Arkansas Commission.

Bell appealed to the Eighth Circuit Court of Appeals. On June 7, 1984, the Circuit Court, in an expedited appeal, reversed the District Court, holding that: (1) a district court is without jurisdiction to determine the legality of the

F.C.C. ruling; (2) the Preemption Ruling is a self-executing order entitled to the same preemptive effect as a federal statute; (3) a district court is without jurisdiction to deny enforcement of the F.C.C. ruling on the basis that it is ultra vires; and (4) the District Court abused its discretion in denying injunctive relief on the grounds that Bell had failed to pass the traditional equitable criteria in addition to the statutory requirements.

The Circuit Court directed the District Court to enjoin the A.P.S.C.'s noncompliance with the depreciation methods mandated by the F.C.C. pending the outcome of *Virginia State Corporation Commission v. F.C.C.*, No. 83-1136 (4th Cir. June 18, 1984). The Eighth Circuit directed the District Court to enter a final order consistent with the final ruling of the Fourth Circuit.

The action in the Fourth Circuit is an appeal of the F.C.C. Preemption Ruling in which the authority of the agency to preempt the states is being challenged pursuant to 28 U.S.C. §2342(1) and 47 U.S.C. §402(a). On June 18, 1984, the Fourth Circuit entered an opinion affirming the Preemption Ruling. However, Petitions for Rehearing en banc are presently pending before the Fourth Circuit.

The Eighth Circuit, in its opinion of June 7, 1984, held that the court of appeals is the exclusive avenue for any type of legal challenge to the F.C.C.'s asserted preemption and any other issue touching the validity of it. Preemption Ruling.

REASONS FOR GRANTING THE WRIT

a. The Decision of the U.S. Court of Appeals for the Eighth Circuit conflicts with this Court's Decisions in *Leedom v. Kyne*, *Hecht v. Bowles*, and *Federal Maritime Commission v. Seatrain Lines, Inc.*

Southwestern Bell brought its complaint in the District Court pursuant to three separate federal statutes, 28 U.S.C. §§1331 and 1337, and 47 U.S.C. §401(b). The complaint asked the District Court to enforce a decision by the F.C.C. by using the court's equitable powers of injunction.

While the statutory provisions of 28 U.S.C. §§1331 and 1337 are grants of general jurisdiction, 47 U.S.C. §401(b) specifically grants district courts original jurisdiction over actions brought to enforce orders of the F.C.C. The District Court, by the very nature of the action, possesses broad equitable jurisdiction and discretion.

There is no language in 28 U.S.C. §§1331 and 1337, and 47 U.S.C. §401(b) which, by express language or inescapable inference, restricts the equitable powers of a district court in determining whether to lend its enforcement powers to any agency decision. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies . . . ." 28 U.S.C. §1337(a).

> If any person fails or neglects to obey an order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was

> regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

74 U.S.C. §401(b).

This Court stated in *Porter v. Warner Holding Co.*, 328 U.S. 395, 90 L.Ed 1332, 66 S.Ct. 1086 (1946):

> *Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.* Virginian R. Co. v. System Federation, R.E.D. 300 US 515, 552, 81 L ed 789, 802, 57 S Ct 592. *Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case."* Hecht Co. v. Bowles, 321 US 321, 329, 88 L ed 754, 760, 64 S Ct 587. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. *In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.* Camp v. Boyd, 229 US 530, 551, 552, 57 L ed 1317, 1326, 1327, 33 S Ct 785.
>
> *Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence*

of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Brown v. Swann, 10 Pet. (US) 497, 503, 9 L ed 508, 511. See also Hecht Co. v. Bowles, supra (321 US 330, 88 L ed 761, 64 S Ct 587).

It is readily apparent from the foregoing that a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court once its equity jurisdiction has been invoked under §205(a). Indeed, the language of §205(a) admits of no other conclusion. It expressly envisages applications by the Administrator for orders enjoining violations of the Act and for orders enforcing compliance with the Act; and it expressly authorizes the District Court, upon a proper showing, to grant "a permanent or temporary injunction, restraining order, or other order." As recognized in Hecht Co. v. Bowles, supra (321 US 328, 88 L ed 759, 64 S Ct 587), the term "other order" contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion. An order for the recovery and restitution of illegal rents may be considered a proper "other order" on either of two theories:

(1) It may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief. To be sure, such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available. White v. Sparkill Realty Corp. 280 US 500, 74 L ed 578, 50 S Ct 186; Lacassagne v. Chapuis, 144 US 119, 36 L ed 368, 12 S Ct 659. *But where, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the*

> *court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law.* Alexander v. Hillman, 296 US 222, 241, 242, 80 L ed 192, 200, 201, 56 S Ct 204.
>
> (2) It may be considered as an order appropriate and necessary to enforce compliance with the Act. Section 205(a) anticipates orders of that character, although it makes no attempt to catalogue the infinite forms and variations which such order might take. *The problem of formulating these orders has been left to the judicial process of adapting appropriate equitable remedies to specific situations.* Cf. Phelps Dodge Corp. v. National Labor Relations Bd. 313 US 177, 194, 85 L ed 1271, 1283, 61 S Ct 845, 133 ALR 1217. *In framing such remedies under §205(a), courts must act primarily to effectuate the policy of the Emergency Price Control Act and to protect the public interest while giving necessary respect to the private interests involved. The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress.* Clark v. Smith, 13 Pet. (US) 195, 203, 10 L ed 123, 127. [Emphasis supplied.]

328 U.S. at 398-400.

In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 72 L.Ed.2d 91, 102 S.Ct. 1978 (1982), the Court explained:

> *The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law. TVA v. Hill*, 437 US, at 193, 57 L.Ed.2d 117, 98 S.Ct. 2279; *Hecht Co. v. Bowles, supra*, at 329, 88 L.Ed. 754, 64 S.Ct. 587.
>
> These commonplace considerations applicable to cases in which injunctions are sought in the federal courts

> reflect a "practice with a background of several hundred years of history," *Hecht Co. v. Bowles, supra*, at 329, 88 L.Ed. 754, 64 S.Ct. 587, a practice of which Congress is assuredly well aware. *Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles. Hecht Co. v. Bowles, supra*, at 329, 88 L.Ed. 754, 64 S.Ct. 587. [Emphasis supplied.]

456 U.S. at 313.

And in *Hecht v. Bowles*, 321 U.S. 321, 88 L.Ed. 754, 64 S.Ct. 587 (1944), the Supreme Court upheld the power of a federal court of equity to deny injunctive relief in the face of a statute which on its face mandated the issuance of such relief:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

321 U.S. at 329-330.

It is clear that when the district courts are called upon to issue injunctive relief based upon a statute whose language is apparently mandatory, those courts are not required " . . . to stand aside and rubber-stamp affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute." *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 746, 36 L.Ed.2d 620, 634, 93 S.Ct. 1773 (1973).

This Court has additionally clarified the extent of the jurisdiction of a district court to reckon with the action of a

federal administrative agency that acts in excess of its legal authority. In *Leedom v. Kyne*, 358 U.S. 184, 3 L.Ed.2d 210, 79 S.Ct. 180 (1958), this Court held that, under 28 U.S.C. §1337, the district courts have jurisdiction to affirmatively attack and vacate an administrative agency's action made in excess of its lawful authority. This jurisdiction exists independent of the statutory review provision. This Court authorized the district court determination by saying that it

> . . . is not one to "review", in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.

358 U.S. at 188. *See also, Harmon v. Brucker*, 355 U.S. 579, 2 L.Ed.2d 503, 78 S.Ct. 433 (1958).

In view of the authority of *Hecht and Seatrain, supra*, the Eighth Circuit's decision, that a district court is without jurisdiction to refuse to enforce the Preemption Ruling, is contrary to the law of the land.

First, the Eighth Circuit erred in finding that 28 U.S.C. §2342(1) and 47 U.S.C. §402(a) preempt the exercise of the type of district court jurisdiction asserted herein. Under 28 U.S.C. §2342(1) the courts of appeals are given " . . . exclusive jurisdiction to enjoin, set aside, suspend . . . , or to determine the validity of (1) all final orders of the Federal Communications Commission . . . ."

This court of appeals remedy is in no way involved in the §401(b) proceeding brought in the District Court by Bell. Therefore, it cannot preempt district court jurisdiction over necessary legal determinations brought forth under §401(b).

Bell did not bring its complaint under 28 U.S.C. §2342(1). Moreover, the A.P.S.C. did not defend under that statute. A

proceeding under 28 U.S.C. §2342(1) is an entirely different remedy than one under 47 U.S.C. §401(b), as can be seen by a reading of the statutes.

The Eighth Circuit's decision that 28 U.S.C. §2342(1) disposes of a district court's jurisdiction to declare the Preemption Ruling ultra vires relies on three cases, *F.C.C. v. I.T.T. World Communications*, 52 U.S.L.W. 4507 (U.S. Apr. 30, 1984); *City of Peoria v. General Elec. Cablevision Corp.*, 690 F.2d 116 (7th Cir. 1982); and *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979). These cases are easily distinguished. None of the cases involve the enforcement of an F.C.C. decision *under the specific jurisdictional base of 47 U.S.C. §401(b).*

By asserting 47 U.S.C. §401(b) as its jurisdictional base, Bell invoked the equitable powers and jurisdiction of a federal district court. This negates the value of these three cases as precedent because in each of these cases the presence of a specific jurisdictional grant to the district court is absent. That is clearly not the case here. There is *no authority* that sets forth the operational frontiers of a district court in a §401(b) proceeding. Therefore, this is a case of first impression.

Here, the District Court properly asserted original jurisdiction under §401(b). There is no language in §401(b) or §2342(1) which expressly, or by inescapable inference, limits the district courts' broad equitable jurisdiction. Neither is there any language in these statutes limiting the ancillary jurisdiction of the court.

Furthermore, §401(b) does not define the term "regularly made" to refer only to procedural regularity as announced by the Eighth Circuit. Appendix, p. A-52. Such definition violates the wisdom of *Hecht* and *Seatrain* by imposing on district courts a mandate to issue injunctions mechanically. Moreover, such definition withholds from district courts any authority to strike down actions of an

agency which are patently illegal simply because the agency observed procedural niceties.

It is a dangerous precedent indeed to deprive the courts, when being asked to enforce an administrative decision, of the fundamental authority to determine if an agency decision on its face is jurisdictionally valid. Petitioner submits that "regularly made" includes at least a finding that the agency acted within its jurisdiction. Clearly, if district courts, under *Leedom*, have jurisdiction (under the general provisions of 28 U.S.C. §§1331 and 1337) to affirmatively attack and vacate an agency action in excess of is lawful authority, then those same courts have jurisdiction to refuse to enforce an ultra vires act. *See*, 4 Davis, Administrative Law Treatise §26:4 (2d Ed. 1983).

The Eighth Circuit struggles to the tortured conclusion that §2342(1) preempts the district courts from declaring an administrative action to be ultra vires by arguing that " . . . otherwise the exclusive provision of the statutory review procedure set forth in 28 U.S.C. §2342(1) and 47 U.S.C. §402(a) would be superfluous." Appendix, p. A-52.

Such a conclusion, however, begs the question of why the Congress enacted §401(b), which expressly gives district courts jurisdiction. The very existence of §401(b) destroys the Eighth Circuit's rigid approach to the idea that, under the authority of *City of Peoria*, *City of Rochester*, and *I.T.T. World*, *supra*, the §2342(1) remedy is exclusive; exclusive to the point of making the district courts a rubber-stamp for decisions of administrative agencies.

The Eighth Circuit seems to be saying that under §401(b) district courts have the power to issue injunctive relief, but no power to refuse such relief if the grounds for such refusal touch in any way on the lawfulness of the agency decision. The Eighth Circuit asserts this would lead to "de novo factfinding", which would interfere with the necessary review of the administrative record. Appendix, p. A-51.

But here the District Court had no record before it and made no finding of fact. The court merely reviewed the face of the agency decision and found as a matter of law that it was a nullity and unenforceable. It was not the District Court that exceeded its lawful authority, but the F.C.C.

District courts have authority under §401(b), §1331 and §1337 to make such fundamental initial determinations as whether an agency action, which a court is asked to enforce, is in excess of the agency's lawful authority.

Finally, the affirmance of the Eighth Circuit's decision would deprive the defendants in an enforcement proceeding of a fundamental defense, i.e., the unlawfulness of the agency's action. In many cases this would be the only defense available if, as mentioned earlier, the agency followed procedural niceties. Such a restriction would conflict with the essential goal of a court in an equitable proceeding, the goal to do "complete justice".

b. The Decision of the U.S. Court of Appeals for the Eighth Circuit Involves an Important Question of Federal Law Which Has Not Been, But Should Be Settled by this Court.

The action of the F.C.C. in adopting the Preemption Ruling has caused an explosion of federal litigation. This Court has already entered a stay of an Ohio Supreme Court mandate which refused enforcement of the F.C.C. Preemption Ruling. *Cincinnati Bell Telephone Co. v. Public Utilities Commission of Ohio*, No. A-70. Other cases addressing the issue of the lawfulness of the F.C.C. decision are: *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, No. 83-1779 (1st Cir. June 29, 1984); *Virginia State Corporation Commission v. F.C.C.*, No. 83-1136 (4th Cir. June 18, 1984); *Pacific Northwest Bell Telephone Co. v. Washington Utilities and Transportation Commission*, 565 F. Supp. 17 (W.D. Wash. 1983), *appeal*

docketed, No. 83-3746 (9th Cir. April 7, 1984); *New England Telephone & Telegraph Co. v. Public Service Board of Vermont*, 576 F. Supp. 490 (D. Vt. 1983), *appeal docketed*, No. 84-7051 (2d Cir. Jan. 17, 1984); *Wisconsin Bell Telephone Co. v. Wisconsin Public Service Commission*, No. 84-C-004 (E.D. Wis. filed Jan. 4, 1984); *Chesapeake & Potomac Telephone Co. of Maryland v. Maryland Public Service Commission*, 560 F. Supp. 844 (D. Md. 1983), *appeal docketed*, No. 83-1403 (4th Cir. May 3, 1983); and *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 570 F. Supp. 227 (M.D. La. 1983), *appeal docketed*, No. 83-3494 (5th Cir. Oct. 11, 1983).

The issue for purposes of this Petition is whether the F.C.C.'s Preemption Ruling is ultra vires in light of the Communications Act of 1934. Clearly, it is.

The Communications Act expressly reserves to the states the authority to prescribe rates for intrastate and local telephone service. 47 U.S.C. §152(b) and §221(b). Appendix, pp. A-72, A-74. These provisions explicitly forbid the F.C.C.'s assertion of authority over the states' sphere of intrastate jurisdiction.

Section 152(b) states that:

> . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . .

47 U.S.C. §152(b).

Section 221(b) states that:

> Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

47 U.S.C. §221(b).

Jurisdiction over intrastate rates, services, charges and practices is left to the exclusive jurisdiction of the states when they are "separable from and do not substantially affect the conduct or development of interstate communications." *North Carolina Utilities Commission v. F.C.C.*, 537 F.2d 787, 793 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1977).

Section 220(h) even permits the F.C.C. to " . . . except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates", so that companies like Bell will not have to maintain two sets of records. Appendix, p. A-73.

Finally, Section 220(j) authorizes the F.C.C. to *apply to Congress* for additional authority if it finds such authority necessary to "harmonize the powers of the Commission and of State commissions . . . ." Appendix, p. A-73.

Thus, it is clear that Congress intended to establish a dual scheme of concurrent regulation, one with jurisdiction over interstate telecommunications, and one with jurisdiction over intrastate telecommunications. The Preemption Ruling violates this Congressional intent.

Any question of whether the F.C.C. could even arguably assert jurisdiction over depreciation rates of the Bell operating companies *after divestiture* has been answered by *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D. D.C. 1982), *aff'd*, ____ U.S. ____, 75 L.Ed.2d 472, 103 S.Ct. 1240 (1983).

As a result of that decision, commonly referred to as the Modification of Final Judgment (MFJ), the Bell operating companies, including Southwestern Bell, were, as a matter of law, stripped of their previous identity as an interstate telecommunications carrier and reconstituted as a provider of purely local telecommunications service. Southwestern Bell is now a purely intrastate entity.

Furthermore, post-divestiture Bell conforms to the definition of a "connecting carrier". A "connecting carrier" is defined in 47 U.S.C. §153(u) as a carrier described in clauses (2), (3), or (4) of 47 U.S.C. §152(b). These clauses read as follows:

> nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this

> title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C. §152(b).

Therefore, with the exception that its tariffs conform to the legal requirements of sections 201 through 205 of the Communications Act, a "connecting carrier" is not subject to F.C.C. jurisdiction for accounting and depreciation purposes.

The F.C.C.'s accounting and depreciation regulations apply only to carriers subject to the Act. 47 U.S.C. §220. Carriers subject to the Act can only be "common carriers" as defined in 47 U.S.C. §153(h) because the definitions of "common carrier" and "connecting carrier" are mutually exclusive. *Comtronics, Inc. v. Puerto Rico Telephone Co.*, 553 F.2d 701, 705 (1st Cir. 1977). In fact, long ago the F.C.C. ruled that all such "connecting carriers" were exempt from its jurisdiction except for the requirements in sections 201 through 205. *See, Rochester Telephone Corporation v. United States*, 307 U.S. 125 (1939); and *Classification of Telephone Companies*, 3 F.C.C. 37 (1935).

The MFJ became effective January 1, 1984, resulting in the breakup of the Bell System. As a result, all of the Bell operating companies and their assets were divested into legally separate and distinct corporations to be held by seven regionally based holding companies.

After the effective date of divestiture the Bell operating companies were prohibited by law from carrying longhaul toll traffic, i.e., toll traffic, interstate or intrastate, that crosses administrative boundaries approved by the Court, known as local access and transport areas or LATA's. Therefore, under the MFJ, the Bell operating companies can offer only *intrastate* toll service which does not cross the boundaries of any LATA.

Southwestern Bell's only contact with interstate or even interLATA calls, after divestiture, is their physical connection

to the facilities of *another carrier* (e.g., AT&T, or MCI) with which Bell has *no affiliation.*

In *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, ____ U.S. ____, 76 L.Ed.2d 1, 103 S.Ct. 1905, 52 PUR4th 514 (1983), this Court held that the A.P.S.C. could regulate wholesale rates of a customer-owned rural electric cooperative. In so ruling this court stated that:

> state regulation . . . is well within the scope of "legitimate local public interests" particularly considering that *although AECC is tied into an interstate grid, its basic operation consists of supplying power from generating facilities located within the State to member cooperatives, all of whom are located within the State.* [Emphasis supplied.]

52 PUR4th at 525.

Similarly, Southwestern Bell's basic operations consist of providing local telecommunications services although it is physically tied into an interstate grid. For Bell to assert that it provides "interstate" services is to openly admit being in violation of the MFJ.

The Preemption Ruling and its enforcement by the numerous Bell operating companies have invaded and disrupted the ratemaking authority expressly reserved to the states by the Communications Act. The Preemption Ruling on its face is an action in excess of and contrary to the F.C.C.'s enabling legislation. The District Court below made no evaluation or examination of any rulemaking or adjudicatory record. It merely looked at the face of the Preemption Ruling and found that it exceeds the F.C.C.'s statutory jurisdiction and is therefore unenforceable.

It is in the national interest that this Court address the jurisdictional validity of the Preemption Ruling and resolve the numerous and conflicting state and federal court controversies surrounding this issue.

c. This Case Presents a Conflict in Opinions Rendered in the First and Eighth Circuits.

In addition to the numerous pending federal cases mentioned previously, the First and Eighth Circuit Courts of Appeals have issued opinions squarely in conflict with one another on the enforceability of the Preemption Ruling.

The Eighth Circuit has held that the Preemption Ruling is a "self executing order of an administrative agency . . . which is accorded the same preemptive effect as a federal statute" and that it is enforceable by a private party like Bell. Appendix, p. A-53.

On June 29, 1984, the First Circuit Court of Appeals, in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine, supra*, held that the Preemption Ruling is not an "order" within the meaning of 47 U.S.C. §401(b) (Appendix, p. 50a), and therefore not enforceable under that statute. Furthermore, the First Circuit found that the Preemption Ruling is not enforceable by a private party. Appendix, p. A-70.

The First Circuit analyzed the proceedings leading up to the issuance of the Preemption Ruling and determined that it resulted from a rulemaking docket wherein the F.C.C. consolidated a petition for a declaratory ruling from

an Ohio telephone company.* Therefore, the Preemption Ruling is a "rule" as a matter of law, and, as such, enforceable by the F.C.C. only. Appendix, p. A-56.

Petitioner submits that the Eighth Circuit erred in presuming that the Preemption Ruling constitutes an "order" within the meaning of 47 U.S.C. §401(b) merely because it was "regular" in a purely procedural sense.

The First Circuit correctly observed the admonition of this Court in *Columbia Broadcasting System v. United States*, 316 U.S. 407, 86 L.Ed. 1563 (1942), that " . . . [t]he particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do, and has done which is decisive." 316 U.S. at 416.

Under this authority the District Court had jurisdiction to initially determine whether the Preemption Ruling was "regularly made", in substance as well as procedure, under 47 U.S.C. §401(b). By adopting the position that the District Court was limited to a review of only the procedural regularity of the F.C.C. ruling, the Eighth Circuit violated the *C.B.S.* doctrine and arbitrarily prevented the

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*The Eighth Circuit's decision (Appendix, p. 38a) creates confusion about the A.P.S.C.'s status during the F.C.C. proceeding which is now on appeal before the Fourth Circuit. *Virginia State Corporation Commission v. F.C.C.*, No. 83-1136 (4th Cir. June 18, 1984). That proceeding began as a rulemaking docket. Arkansas and other states submitted comments as is customary in a rulemaking (as opposed to an adjudicatory) proceeding. However, the F.C.C. consolidated this rulemaking proceeding with an adjudicatory proceeding involving an Ohio telephone company. The A.P.S.C. never became a party to that adjudication. Thus, the A.P.S.C. is not subject to an attempted enforcement action. For that reason, no stay was sought by the A.P.S.C. or any other state commission not involved in the Ohio adjudication. The Arkansas Commission intervened in the Fourth Circuit appeal to challenge a rule. The attempted enforcement by Bell of that rule as an adjudicatory order does not transform the original rulemaking procedure into an adjudicatory order binding on nonparties like the A.P.S.C.

District Court from making its own determination as to whether the agency's ruling is enforceable under §401(b). That is, if the Preemption Ruling was not jurisdictionally authorized under the Communications Act (as the District Court so found) the District Court had no jurisdiction under §401(b) to enforce it.

The Eighth Circuit's position, then, has the obvious effect of depriving district courts of the authority to determine their own jurisdiction to grant the relief prayed for. This limitation on the district courts is violative of the well established rule that a court must, on its own motion, determine that it has jurisdiction over the case before it. *Minnesota v. Hitchcock*, 185 U.S. 373, 46 L.Ed. 954, 22 S.Ct. 650 (1902).

Here, the application by the Eighth Circuit of this unprecedented restriction on a fundamental power of district courts results in the erosion of a long reserved right of the states. In essence, a federal agency has been allowed to use the federal courts to rubber-stamp its ultra vires act. This clearly violates the safeguards which an independent federal judiciary is intended to provide.

CONCLUSION

For all the reasons set forth herein, Petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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DATED: September 25, 1984

APPENDIX

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 82-581
32609

In the Matter of	)	
	)	
Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's Rules and Regulations with respect to accounting for station connections, optional payment plan revenues and customer provided equipment and sale of terminal equipment.	)	CC Docket No. 79-105 *RM-3017*
Petition for Declaratory Ruling on Question of Federal Pre-emption Involving Order Of the Public Utilities Commission of Ohio in Conflict with (i) FCC Prescriptions Under Section 220 of the Communications Act and (ii) Established FCC Policies.	)	

MEMORANDUM OPINION AND ORDER

Adopted: *December 22, 1982* Released: *January 6, 1983*

By the Commission: *Commissioner Fogarty issuing a separate statement.*

1. The Commission has before it a Petition for Reconsideration filed on June 7, 1982, by the American Telephone and Telegraph Company, on behalf of itself and the associated Bell System Operating Companies (AT&T).

AT&T seeks reconsideration of the Commission's decision in *Amendment of Part 31*, 89 FCC 2d 1094 (1982) (hereinafter cited as *Preemption Order*), in which the Commission determined that Sections 220(a) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. 220(a) and 220(b), did not preempt state commissions from applying different accounting and depreciation procedures for purposes of intrastate ratemaking proceedings.[1] The *Preemption Order* was a reconsideration of *Amendment of Part 31*, 85 FCC 2d 818 (1981) (hereinafter cited as *Expensing Order*).

2. The Commission also has before it a Petition for Declaratory Ruling filed on June 7, 1982, by General Telephone Company of Ohio (GTE of Ohio). This petition requests that the Commission preempt an order of the Public Utilities Commission of Ohio (Ohio) that denied GTE of Ohio the same depreciation rates for intrastate purposes as had been prescribed by this Commission. GTE of Ohio contends that Section 220(b) established the rate prescribed by the Commission as the only depreciation rate the company could utilize.

3. The Commission established a joint reply period for the two petitions, utilizing the pleading cycle for comments in response to the Petition for Reconsideration, and allowed parties to cross-reference their pleadings where appropriate. In addition to pleadings filed by the petitioners and the GTE parties, comments or reply comments were filed by the Arkansas Public Service Commission (Arkansas), Ohio, the People of the State of California and the Public

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[1] On June 8, 1982, GTE Service Corporation, on behalf of itself, United Telephone System, Inc., and Continental Telecom, Inc. (hereinafter referred to as GTE), filed a Petition for Clarification of the Commission's *Preemption Order*. This petition was dismissed as untimely. *Amendment of Part 31*, Mimeo No. 4766 (released June 24, 1982). However, the Commission stated that it would consider the substance of the petition in connection with AT&T's petition.

Utilities Commission of the State of California (California) the Virginia State Corporation Commission (Virginia), the National Association of Regulatory Utility Commissioners (NARUC), the United States Independent Telephone Association (USITA), the Office of Consumers' Counsel, State of Ohio (Consumers' Counsel), and the United Telephone System Inc. and the Idaho Public Utilities Commission (Idaho). A summary of the comments is contained in Appendix A. Below we consider the issues raised on reconsideration, after which we shall consider the question presented by GTE of Ohio's Petition for Declaratory Ruling.

I. *Background*

4. In *Docket No. 19129*, 64 FCC 2d 1, 54-56 (1977), we concluded that it would be desirable to have the causative rate payer bear the costs associated with station connections. We directed AT&T to file a plan for accomplishing this objective. Following AT&T's submission we initiated this proceeding, albeit with a somewhat different approach for modifying the accounting for station connections than proposed by AT&T.

5. After reviewing the comments, we concluded that the drop, block and protector portion of station connections should not be included in any accounting or regulatory revisions. We also concluded that our objective of placing the costs of station connections on the cost causative customer could not be achieved by means of an accounting change alone. This is so because costs associated with the provision of inside wiring must be apportioned between the federal and state jurisdictions as long as inside wiring is provided as a tariffed service subject to dual jurisdiction. Complete unbundling could be achieved by requiring inside wiring to be provided on a detariffed basis, as was done with customer premises equipment. Accordingly, we initiated a further inquiry to explore the detariffing concept further, *Amendment of Part 31*, 86 FCC 2d 885 (1981).

6. Nevertheless, we concluded that changes in accounting and depreciation procedures that would begin expensing the inside wiring portion of the station connection account would be in the public interest, and would facilitate the deregulation of the provision of inside wiring if the Commission should later decide to take that approach. The principal changes required that future costs of installing inside wiring and similar costs be included as an expense in Account 605, Repair of Station Equipment. Such costs were previously capitalized in Account 232, Station Connections. The expensing of these costs would be phased in over a four year period unless a carrier obtained state commission approval to expense one hundred percent immediately. The *Expensing Order* also required that the present net investment in inside wiring and the investment capitalized during the phase-in period be amortized over a ten year period. These expensing and amortization rules replaced the depreciation procedures that had previously applied to the inside wiring portion of the station connections account.

7. On reconsideration, we concluded that the *Expensing Order* was not intended to preempt state commissions from utilizing other depreciation or accounting procedures for intrastate ratemaking proceedings, unless such preemption occurs as a matter of law. Our discussion was based in part on an assumption that most or all of the state commissions would follow our lead. We also indicated that Section 220 does not preclude state commissions from departing from accounting and depreciation rules prescribed by this Commission for purposes of regulating intrastate communications services. In reaching this conclusion, we reviewed Section 20(5), the Interstate Commerce Act predecessor of the accounting and depreciation provisions contained in Section 220. We concluded that nothing in the history of Section 20(5) provided any indication of whether that provision had been intended to preempt state commissions from prescribing divergent depreciation rates when the Interstate Commerce Commission (ICC) had prescribed a rate. We stated:

> [i]nasmuch as Section 20 had never been construed to restrict state commissions from requiring carriers to keep additional records for purposes of intrastate ratemaking and court decisions in analagous contexts did not adopt an expansive interpretation of that provision, the reenactment of that language should not be interpreted to restrict state commissions from keeping such additional records in the absence of clear evidence that the 1934 Congress intended to produce that result.

Preemption Order, supra at 1102.

8. We also reviewed the legislative history of the Communications Act and concluded that Congress had been uncertain of the preemptive effect of reenacting the Interstate Commerce Act language and that it apparently did not want to resolve the question at that time. We concluded that Congress had been attempting to obtain as much uniformity as possible without coercing any state commission to use ratemaking methods which it might find unacceptable. We found that we had proceeded in a manner consistent with this purpose for nearly four decades, noting that we had recognized divergent practices by state commissioners from time-to-time. The language of Section 2(b)(1) was found to support the interpretation that state commissions are not precluded from applying different accounting and depreciation procedures from this Commission. The *Preemption Order* concluded by finding that nothing in the Act precluded us from preempting state commission actions that might interfere with or tend to frustrate policies or rules we have adopted to carry out statutory objectives with respect to interstate or foreign communications, but we also found that federal regulation would not be frustrated if carriers maintain additional records for intrastate ratemaking purposes.

II. *Discussion*

9. The question presented in the reconsideration petition is a clearly delineated controversy over whether Sec-

tion 220(b) preempts state depreciation prescriptions that are inconsistent with the rates prescribed for classes of property by this Commission, or, whether Section 2(b)(1) or Section 221(b) reserve to the states the right to prescribe their own depreciation rates for intrastate regulatory purposes. Alternatively, it is argued that the Commission should preempt inconsistent state depreciation rates pursuant to its authority to preempt state actions which would frustrate or interfere with the accomplishment of federal objectives. *See North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (hereinafter cited as *NCUC I*). The *Preemption Order* was the first time the Commission had squarely addressed the preemptive effect of a prescribed depreciation rate, despite having prescribed rates for more than thirty years. No federal court has addressed the question of the preemptive effect of a Commission prescribed depreciation rate.[2]

10. It is argued that the Commission erred in the earlier decision by concentrating on Sections 220(a) and 220(g) rather than properly analyzing Section 220(b), the provision dealing directly with depreciation. A careful review of AT&T's and GTE's pleadings and a thorough reevaluation of the entire question of the Commission's depreciation jurisdiction leads to the conclusion that the evaluation in the *Preemption Order* did not sufficiently consider the effect of Section 220(b). Accordingly, we shall undertake to evaluate anew the scope of the Commission's jurisdiction under Section 220(b).

11. Before turning to the analysis of the statutory provisions, it is necessary to understand the relationship

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[2] The United States Supreme Court has held that state commissions may prescribe depreciation rates where the empowered federal commission has not prescribed rates. *Northwestern Bell Telephone Co. v. Nebraska State Railway Comm.*, 297 U.S. 471 (1936). The Court specifically reserved judgment on the effect of prescribed rates by the federal commission.

between capitalizing and expensing a transaction or economic event. When an event is capitalized, its cost is recorded on the company's books to be recovered over some future period through depreciation charges to operating expense. Depreciation as used here is an accounting convention for allocatively spreading the original cost, less net salvage, over the useful life of a capital asset. Thus, for there to be depreciation there must be costs that are to be recovered over more than one accounting period. However, when the decision to expense is made, all costs are to be recovered at one time. Thus, the decision to expense is a determination that there is no category of asset for which depreciation expense will be allowed. It is therefore clear that the decision to commence expensing the inside wiring portion of station connections involves questions of depreciation policy.

12. The law is clear that federal regulation should not be presumed to preempt state regulations without clear evidence of either congressional design to preempt the field or that state regulatory activities would obstruct the accomplishment and execution of the full purposes and objectives of Congress. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963), *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Our review reveals that both criteria are satisfied in this case. In reaching this conclusion we analyzed the language of Section 220, the legislative history, relevant court cases, and our regulatory objectives.

A. *Statutory Language*

13. The Commission's express jurisdiction with respect to depreciation is set forth in Section 220(b). That section provides:

> The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of deprecia-

> tion which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

14. The plain language of the statute is express and unequivocal. Section 220(b) says the Commission "shall" make depreciation prescriptions, and that carriers "shall not" charge depreciation different than that prescribed by the Commission. That this preempts inconsistent state action is further indicated in Section 220(h) which gives the Commission discretion to "except" carriers from the requirements of Section 220 "where such carriers are subject to state commission regulation."

15. The requirement of Section 220(i) that states be given an opportunity to comment before the Commission prescribes "any requirements as to accounts, records and memoranda" is consistent with an interpretation that states are preempted when the Commission has acted in the depreciation area. By providing that states be given notice, Congress ensured that state needs for accounts, records and memoranda brought to the Commission's attention would be considered. Such a procedure assures that the states' needs and legitimate interests are met.

16. In setting the duties of the Commission and the prohibitions on the carriers subject to the Act, Congress spoke of depreciation in general terms without any attempt to make distinctions between either "intrastate" or "interstate" property. This is significant because when Congress wanted to make such distinctions in the Act it did so. See, *e.g.*, 47 U.S.C. 221(c) and (d), and 410(c). The fact that Congress did not make such a distinction here indicates that it intended no distinction.

17. Taken as a whole, the language of Section 220 appears clearly to preempt the states in connection with depreciation expense determinations and the related accounting. The language strongly implies that the states may not depart from depreciation rules prescribed by the FCC unless the Commission in its discretion allows them to do so. Otherwise, the federal statute would govern state depreciation practices in form only, allowing the states to treat substantive depreciation matters as they might choose. While that might be a plausible construction of Section 220, after full analysis we do not believe that Congress intended such a feeble gesture. There would be little purpose to require the carriers to keep all their books pursuant to an FCC prescription, and then allow the states to require the carriers to follow inconsistent depreciation practices. Instead, the language of the section and the comprehensive treatment given to this matter by the Congress demonstrate that more was intended. Accordingly, we find that the statutory language indicates that FCC depreciation prescriptions are to be followed in both the federal and state jurisdictions unless the FCC provides otherwise. As demonstrated below, this construction is also consistent with the legislative history.

B. *Legislative History*

18. In the *Preemption Order* we found that the legislative history of Section 220 was inconclusive and at most indicated that Congress was "not sure" about the

preemptive effect of the new legislation. 89 FCC 2d at 1106. However, the reconsideration petition and comments supporting it show that Congress believed that the language ultimately adopted would preempt the states from prescribing depreciation rates for subject carriers when the Commission had prescribed rates.

19. In our *Preemption Order*, we observed that Section 220 of the Communications Act had been adopted from Section 20 of the Interstate Commerce Act, and our review of the few ICC cases touching upon preemption did not reveal the ICC to have possessed the kind of broad preemptive power now urged by GTE and AT&T. However, after reviewing the pre-1934 cases again, we find that, while not dispositive, they lean more toward GTE and AT&T's views than against them.

20. The closest the ICC came to delineating its position on this matter came in *Depreciation Charges of Telephone Companies*, 118 I.C.C. 295, 332 (1926), where it said:

> It seems to be well established that where a local telephone company undertakes to originate or deliver toll messages, and most of them do so undertake, practically all of its property is open for use in interstate commerce and at any time may be so used. Under such circumstances, no doubt would seem to exist as to the power of Congress to regulate the accounting practices of such companies with respect to their property, including the accounting for depreciation.

In the *Preemption Order* we focused on the fact that the ICC had not actually prescribed depreciation rates and thus there was uncertainty regarding the ICC's actual authority. However, after reviewing that case again we find that the better and more sensible interpretation is that if the ICC had prescribed depreciation rates, the state commissions would have been precluded from prescribing rates that diverged from those it prescribed. We cited *Smith v. Il-*

linois Bell Tel. Co., 282 U.S. 133, 159 (1930), in the *Preemption Order* as supporting our conclusion that the ICC decision did not preempt the states. In that decision the Supreme Court held that absent ICC action prescribing depreciation rates, Section 20(5) did not preclude states from prescribing depreciation rates. Since the ICC proceeding did not actually prescribe depreciation rates, but only began a proceeding looking toward the ultimate prescription of depreciation rates, there were no depreciation rates prescribed that could have preempted state-prescribed depreciation rates. Thus *Smith* only stands for the proposition that until the ICC actually prescribed rates, there was no basis for preempting the states. It did not reach the question of whether Section 20(5) would preempt the states if the ICC prescribed depreciation rates. [3]

21. At the hearings pertaining to the Communications Act the then chairman of the ICC indicated his belief that the ICC depreciation rulings would govern both federal and state depreciation practices:

> Paragraph (j) . . . should be most carefully considered. It unquestionably directly conflicts with, and destroys the uniformity of systems of accounts and depreciation accounting required by the preceding provisions of the section. That is not true under the present law. [4]

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[3] Similarly, *Interstate Commerce Commission v. Goodrich Transportation Co.*, 224 U.S. 194 (1912) and *Kansas City Southern Ry. Co. v. I.R.S.*, 52 F.2d 372 (8th Cir. 1931) do not appear to have any pertinance to the issue at hand. As noted in 89 FCC 2d at 1099, *Goodrich* did not raise any question with respect to the effect of ICC accounting rules upon activities not subject to ICC rate regulation. The *Kansas* holding simply reconciles two federal statutes, the Internal Revenue Code and the Interstate Commerce Act. It did not purport to establish new law on state preemption.

[4] Ltr. of F. McManamy, Hearings on S. 2910, p. 208.

22. Other witnesses who appeared at the hearings repeated the same view. See statements of Mr. Gifford, [5] Mr. Benton, [6] and Dr. Irvin Stewart. [7]

23. The *Preemption Order* relied heavily on the "silence contained in the Congressional Reports," 89 FCC 2d 1105, in concluding that the legislative history did not support a finding that Section 220 was intended to preempt state commissions from prescribing their own depreciation rates for intrastate purposes. However, a reexamination of the legislative history in light of the comments on reconsideration indicates that the committee reports accompanying the bills did contain language indicating that the committees believed that the predecessor provision had preempted the states. The House Report, in discussing the Section 220(j) provision (which was not adopted) that would have reserved jurisdiction over depreciation rates to the states for purposes of intrastate ratemaking, stated that the provision was "responsive to the requests of the State commissions that the present law be *changed so as to permit* those bodies to exercise, for State purposes, certain jurisdiction over . . . depreciation accounting." [8]

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[5] Hearings on H.R. 8301, pp 191-192 (See 89 FCC 2d at 1105, fn.17). The *Preemption Order* had indicated that Mr. Gifford's preemption views were tentative. However, careful review of that testimony reveals that Mr. Gifford's uncertainty may have concerned the date Section 20(5) was enacted, not preemption.

[6] Hearings on S. 2910, 73rd Cong., 2d Sess., p. 181 (1943).

[7] Hearings on H.R. 8301, 73rd Cong., 2d Sess., p. 17 (1934).

[8] H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 7 (1934) (emphasis added). The section (j) proposed by the House would have provided: "Nothing in this section shall (1) limit the power of a State commission to prescribe, for the purposes of the exercise of its jurisdiction with respect to any carrier the percentage rate of depreciation to be charged to any class of property of such carrier, or the composite depreciation rate, for the purpose of determining charges, accounts, records, or practices; (2) relieve any carrier from keeping any accounts, records, or memoranda which may be required to be kept by any State commission in pursuance of authority granted under State Law." H.R. 8301, 73rd Cong., 2d Sess. Section 220(i) (February 27, 1934).

24. In remarks on the House floor, Representative Rayburn, Chairman, House Committe on Interstate and Foreign Commerce explained Section 220 of the proposed bill as follows:

> [p]aragraphs (a) to (g), relating to accounts records, memoranda, and depreciation, is based upon sections 20(5) to (8) of the Interstate Commerce Act with *changes necessary to permit State commissions to prescribe* the systems of accounts for the intrastate operation of carriers. Paragraphs (h) to (j) are new . . . *paragraph (j) removes any limitation upon the power of a State commission to prescribe, for the purposes of the exercise of its jurisdiction, rates of depreciation.* The last three paragraphs named were placed in the bill at the request of the State commissions which feel that their task of regulating intrastate communications will be greatly facilitated by the adoption of these paragraphs.[9]

25. The Senate version of Subsection (j) took a totally different approach than the House version. It called "for investigation and report to Congress instead of immediately turning over these matters to the State." S. Rep. No. 781, 73rd Cong., 2d Sess. 5 (1934).[10] The version of Section 220(j) finally enacted was the result of agreement in the conference committee. The conferees agreed to adopt the House provisions as to Sections 220(h) and (i), but decided against the House Section 220(j) proposal to remove any limitation upon the power of states to prescribe rates of

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[9] 78 Cong. Rec. 10314 (1934) (emphasis added).

[10] The Senate version of Section 220(j) provided: "The Commission shall investigate and report to the Congress whether in its opinion legislation is desirable (1) authorizing the Commission to except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates; and (2) permitting the State commissions, in pursuance of authority granted under State Law, to prescribe their own percentage rates of depreciation or systems of accounts records, or memoranda to be kept by carriers." S. 3285, 73rd Cong., 2d Sess. Section 220(j) (March 28, 1934).

depreciation. Instead, Section 220(j) was modified along the lines of the Senate proposal to require the Commission to "investigate and report to Congress as to the need for legislation to define or further harmonize the powers of the Commission and of State commissions with respect to other matters to which this section relates." Conf. Comm. Rep. No. 1918, 73rd Cong., 2d Sess. 17 (1934). The obvious inference to be drawn is that the conferees were not prepared at that time to allow the states to prescribe depreciation rates different than those established at the federal level, but that matter might be considered later if the report required by Section 220(j) indicated it to be appropriate.

26. The hearing testimony and Committee reports therefore indicate that the language being recodified from Section 20(5) of the Interstate Commerce Act preempted the state commissions' jurisdiction over depreciation. The rules of statutory construction provide that where Congress reenacts a provision from an existing statute, it intends that the construction applicable to the existing provision apply as well to the new provision.[11] The legislative history thus supports the actual language of Section 220(b) and indicates that Congress intended to preempt state commission jurisdiction over depreciation rates for subject carriers when it recodified the language from the Interstate Commerce Act. Accordingly, we conclude that the analysis of the legislative history contained in the comments of AT&T and GTE accurately represents the intent of Congress and that the more persuasive reading of the legislative history supports the construction that Section 220(b) preempts inconsistent state action where the Commission has prescribed depreciation rates for a carrier.

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[11] Courts have given weight to interpretations of the Interstate Commerce Act in interpreting the Communications Act. See, *e.g.*, *American Telephone and Telegraph Company v. FCC*, 487 F.2d 865 (2d Cir. 1973).

C. *Administrative and Court Decisions*

27. The *Preemption Order* cited *Accounting Rules for Telephone Companies*, 203 ICC 13 (1934), as evidence that the FCC could not preempt state depreciation practices. There the ICC recognized that states might have additional accounting needs and indicated that it had permitted state-prescribed sub-accounts within the federally-required books of account. However, the adoption of a blanket subdivision rule does not lead to the conclusion that federally adopted accounting and depreciation rules are not preemptive. Rather, it reflects an awareness that state commissions may have special data requirements to properly administer their regulatory policies which may require additional detail beyond that prescribed by the federal agency. A subdivision rule, however, does not permit what is accounted for as an expense to be capitalized in the guise of subdividing an expense account. While we may allow subdivisions of accounts, we will not allow inconsistent accounting or depreciation methods unless such practices are otherwise consistent with the public interest. Any other policy would obliterate the prescriptive effect of our adoption of a uniform system of accounts.

28. In fact we have approved variations from the prescribed uniform system of accounts. For example, our rules give carriers blanket authority to subdivide certain prescribed accounts "provided such subdivisions do not impair the integrity of the accounts prescribed." 47 C.F.R. 31.01-2(d)(1). C.F. 31.01-2(f), authorizing carriers to subdivide accounts "in the manner ordered by any state commission having jurisdiction...." We also have approved state commission rate making treatment of plant under construction different from that adopted by us. See 89 FCC 2d at 1107.

29. There may well have been some instances of inconsistent state treatment of depreciation in the past.

However, we do not seek controversy unless it is necessary to protect vital federal interests. Either such instances did not come to our attention or they may not have appeared threatening to federal interests.[12] In the past the communications marketplace was typified by monopoly conditions and life and salvage factors underlying the state rates were generally very similar, if not identical, to those used by the Commission. In that environment it was not essential that the Commission assert all the authority granted it. See *Computer and Communications Industry Association v. FCC*, No. 80-1471 (D.C. Cir. November 12, 1982). As discussed, *infra.*, in the more competitive conditions prevailing today, the utilization of proper methods and rates is more critical if the proper incentives are to be created to insure that the marketplace will function efficiently to bring the benefits of that competition to the ratepayers of this country. Therefore, where it is necessary to protect important federal policies against frustration by inconsistent state actions, we will exercise the full breadth of our depreciation powers. *See* para. 14 above.

30. Nor is there any merit to the argument that federal preemption of depreciation practices constitutes intrastate ratemaking which might run afoul of 47 U.S.C. 152(b). Section 220(b) only prohibits the states from setting depreciation rates for telephone property inconsistent from those prescribed by the FCC. It does not require that any particular tariff for intrastate service be accepted by the state commissions. The setting of depreciation rates and classes of depreciable property only resolves a single issue impacting the ratemaking process. It does not restrict the state commission's broad discretion in setting charges for individual services. In any event, Section 2(b) of the Act, 47 U.S.C. 152(b), has a well defined purpose which would not be

[12] *Pacific Telephone and Telegraph Company v. California*, 401 P. 2d 353 (1965), was cited in the *Preemption Order* to support nonpreemption. However, the California Supreme Court did not analyze Section 220(b) or its legislative history and its determination is therefore unpersuasive.

implicated here: "to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network." *NCUC I, supra* at 794 n.6. Here the setting of depreciation rates is not an essentially local incident or practice and it has substantial effects upon the administration and development of the interstate telephone network. [13]

D. *Preemption Under Federal Supremacy*

31. Even if one were to assume that Section 220(b) did not automatically preempt the states whenever this Commission has acted, federal preemption of inconsistent state depreciation would be justified in this case to avoid frustration of validly adopted federal policies. The Fourth Circuit has stated:

> We have no doubt that the provisions of section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under sections 201 through 205.

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[13] Nor is federal preemption of depreciation practices inconsistent with 47 U.S.C. 221(b).
Section 221(b) was intended to reserve state jurisdiction over exchange rates where exchange boundaries extend over two states. That provision was not intended to create new reservations to the states beyond that contained in Section 2(b) and the narrow circumstance encompassed by interstate exchanges. See *Computer and Communications Industry Association v. FCC, supra*, and *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1046 (4th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977) (hereinafter cited as *NCUC II*).

NCUC I, supra at 793. To the same effect, see *Computer and Communications Industry Association v. FCC, supra* at 35.

32. The D.C. Circuit recently addressed the preemption question, observing:

> We fail to see any distinction in this case between preemption principles applicable to state ratemaking authority and those applicable to other state powers. The operative principle [is that]...preemption of state tariffs on CPE is justified because state tariffs would interfere with the consumer's right to purchase CPE separately from transmission service and would thus frustrate the validly adopted federal policy.

Id. at 38. The court went on to find that conflicting state regulation may be preempted even though there is some indirect effect on state ratemaking discretion, noting:

> the Act itself does not distinguish between authority over rates and authority over other aspects of communications. Sections 2(a) and (b) of the Act allocate federal and state authority with regard to both "charges [and] . . . facilities." Therefore, conflicting federal and state regulations regarding dual use CPE are no more acceptable under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the *NCUC* cases.

Id. at 38-39.

33. The provision for adequate capital recovery is important to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, world-wide wire and radio communication service with adequate facilities at reasonable charges...." 47 U.S.C. 151. State depreciation rate prescriptions that do not adequately provide for capital recovery in the competitive environment, which constitutes this Commission's policy in those markets found capable of supporting competition, would

frustrate the accomplishment of that policy and are preemptable by this Commission.

34. Over the past decade the Commission has embarked in several areas of telecommunications to pursue a policy of encouraging competition wherever the market conditions will support such a policy and produce benefits to the public interest. In *MTS-WATS Market Structure Inquiry*, 81 FCC 2d 177 (1980), the Commission opened the domestic MTS-WATS market to competitive entry, reserving the question of entry to Alaska to a later phase since concluded with the adoption of a similar open entry policy, *MTS-WATS Market Structure Inquiry*, FCC 82-515 (released November 30, 1982). In *Computer Inquiry II*, 77 FCC 2d 384 (1980), *recon.*, 84 FCC 2d 50 (1980), *recon.*, 88 FCC 2d 512, *aff'd sub nom., Computer and Communications Industry Association v. FCC, supra*, the Commission opened the areas of enhanced services and customer premises equipment to competitive provision. These are just two examples of the policies which the Commission has pursued. However, they do point up the fact that if this policy is to be successful, it will be necessary for the market place to operate efficiently. Such efficient operation requires proper price signals generating from supply and demand conditions.

35. Capital recovery is an important determinant of the price at which services can be offered and significantly affects the amount of facilities provided to supply the needs of the communications industry. In *Amendment to Part 31*, 83 FCC 2d 267 (1980), *recon.*, 87 FCC 2d 916 (1981), the Commission adopted remaining life and straight line equal life group depreciation methods that recover capital on a basis that approximates straight line unit depreciation more closely than did the previously used methods. More timely capital recovery was anticipated to result in faster technological innovation with its accompanying benefits of more efficient service provision and lower costs resulting from more productive use of facilities.

36. Capital recovery issues are important in the implementation of *Computer Inquiry II* due to the part depreciation plays in the determination of net book value and the resultant gain or loss that may occur on the transfer of assets to the new subsidiary. It will also be significant in any later transfer of assets from the provision of regulated service to unregulated service or vice-versa. Thus, appropriate capital recovery will ease the regulatory burdens associated with supervising the transition to the new structure.

37. Depreciation is a significant portion of the revenue requirement of the regulated telephone companies. As such, it plays an important role in determining the price at which they offer their services. If competition is to be viable, it is necessary for prices to reflect depreciation expenses that are realistic for a competitive market. Absent such depreciation levels, improper signals will be given to the market. Since most plant is used interchangeably to provide interstate and intrastate communications service, supply and demand is determined by the combination of inputs from service demand in both regulatory jurisdictions. Approximately 75 percent of exchange plant is allocated to the intrastate jurisdiction. It is clear that unless telephone plant, including that portion subject to allocation to the intrastate jurisdiction, is depreciated at a reasonable rate, improperly timed capital recovery will occur. Indeed, in an increasingly competitive environment, it is possible that improper capital recovery could delay or prevent modernization which would add to the costs borne by ratepayers and could, ultimately, threaten carriers' ability to fully recover their invested capital. Moreover, the extent of state action attempting to prevent carriers from utilizing our depreciation prescriptions places substantial burdens on carriers and could well impair their ability to raise the investment capital they will need to fully compete in the continually

evolving competitive telecommunications marketplace.[14] Such a result could undermine the achievement of the Commission's objective to develop policies that will engender a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices.

38. NARUC contends that preemption with respect to station connections is unnecessary and will not produce competitive benefits because expensing is not the same as unbundling. While NARUC is correct in a strict sense, it avoids the critical issue, which is the proper timing of cost recovery. If the Commission preempts with respect to station connections and all states must expense these costs, current ratepayers will be paying these costs instead of future ratepayers as would be the case with capitalization. Thus, future prices will reflect the appropriate costs for providing those services. Moreover, if these costs are expensed and state commissions must allow rates to cover these costs, it is likely that the cost causative ratepayer will in many cases be charged for the costs being expensed in connection with the provision of inside wiring. Thus, the Commission's objective may be substantially achieved by preempting state commissions from departing from our expensing rules.

39. In 1971 Congress amended the Communications Act to change the procedures for allocating costs between federal and state jurisdictions by adding Section 410(c). The

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[14] AT&T and GTE indicate several state commissions have refused to follow, have indicated an intent not to follow, or are being urged not to follow Commission determinations with respect to the expensing of inside wiring and/or the adoption of straight-line equal life group or remaining life depreciation methods. A staff review of state action in conjunction with AT&T intrastate tariff proceedings reveals that all but two states have approved expensing of station connections, that 13 states have rejected and 12 have approved equal life group depreciation, and that 9 states have rejected and 22 have approved remaining life group depreciation. Prior to issuing our *Order* in this docket we did not expect that such significant variance would be required by states.

Commission was given the ultimate authority with respect to such allocations, further solidifying its superintendency over common carrier communications. See *NCUC I, supra* at 795. Section 410(c) procedures provide for uniformity in the separations process, thereby insuring that plant, expenses and revenues will be rationally accounted for in the dual jurisdictional environment. The utilization of one depreciation rate is the most effective method for insuring that this uniformity will be maintained and to insure that no jurisdiction bears a greater burden than another in the transition to a fully competitive marketplace. Several parties suggest that under or over recovery will result from one jurisdiction or another because of the shifting usage patterns for telephone plant over time and argue that if such a result were to occur, significant inequities would result to both ratepayers and carriers. A uniform depreciation rate for each class of property applicable to all property whether allocated to the federal or state jurisdiction clearly eliminates these potential problems.

40. For all of these reasons, it is apparent to us that a substantial impact on federal policies could result if state commissions were allowed to diverge from Commission prescribed depreciation rates and practices. Accordingly, it is essential to preempt inconsistent state depreciation practices to avoid frustration of these vital national policies.

III. *Declaratory Ruling Petition.*

41. GTE of Ohio seeks to have the Commission preempt an order of the Ohio Public Utilities Commission that did not approve remaining life and equal life group rates for intrastate ratemaking purposes. As alleged by GTE of Ohio, the differential in rates amounts to seven million dollars per year. GTE of Ohio states that failure of this Commission to preempt the state will frustrate the achievement of federal policies adopted by this Commission. Its argument is similar to those cited in connection with the reconsideration petition.

42. Essentially the same arguments are made against the GTE of Ohio petition as were urged on reconsideration with regard to the substance of the issue. However, Ohio cites an Ohio statute that precludes the state commission from adopting remaining life depreciation for intrastate purposes.

43. One procedural argument is raised by Ohio with respect to the petition. It contends that the question presented is premature since the order is subject to further reconsideration before the Ohio Commission pursuant to a request filed by GTE of Ohio. We do not agree since the purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists. A case or controversy in the judicial sense is not required, *NCUC I, supra* at 790-1. In this case, it appears necessary to issue such a ruling to clarify for the state commissions and the carriers the effect of our depreciation prescriptions. The fact that reconsideration proceedings are under way in Ohio does not mitigate against such a course in light of the divergencies from this Commission's depreciation methods and rates that are occurring to the detriment of federal policies. Thus, we find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void. The existence of a state statute preventing a state commission from adopting a particular method does not affect this determination. When federal preemption is involved, there is no difference between a statute or a regulation of a state commission. Both must fall in the face of overriding federal concerns and policies.

IV. *Conclusion*

44. We have carefully reviewed the record upon reconsideration. The issues raised concerning the *Preemption Order* caused us to reevaluate the statutory language of Section 220(b), the legislative history of the provision, and the relevant judicial and administrative proceedings

relating to the subject. Our considered judgment after this review is that the *Preemption Order* must be reconsidered. We find that the most logical and reasonable interpretation of Section 220(b) of the Act is that where the Commission prescribes depreciation rates for classes of property, state commissions are precluded from departing from those rates. Since the depreciation method utilized is a material part in determining the rate to be applied, state commissions are also precluded from departing from the depreciation methods prescribed by the Commission. Thus, the *Expensing Order* is binding upon state commissions and they must expense additions to inside wiring in accordance with the plan established therein. Moreover, they must follow the amortization procedures adopted in that decision for the embedded inside wiring and any additions to the capitalized amount as a result of the phase-in of the expensing of inside wiring.

45. Even if Section 220(b) does not preempt state commissions, we would act under our authority to preempt state actions that interfere with the accomplishment of federal policies and objectives. *Computer and Communications Industry Association v. FCC, supra*, and *NCUC II*. We note that petitioner and the parties supporting the petition cite several states that have indicated they do not intend to follow the Commission's depreciation prescriptions or expensing of inside wiring, or have refused to follow either. In light of the concerns expressed about an efficiently functioning market, we must find that inconsistent depreciation rates prescribed by state commissions will interfere with the efficient operation of the communications marketplace and thereby frustrate the achievement of the Commission's policies. Accordingly, we find that this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates.

46. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), and 220(b) of the Communications Act of 1934,

as amended, 47 U.S.C. 151, 154(i), and 220(b), That the Petition for Reconsideration filed by the American Telephone and Telegraph Company IS GRANTED.

47. IT IS FURTHER ORDERED, That the Petition for Declaratory Ruling filed by General Telephone Company of Ohio IS GRANTED to the extent reflected herein.

48. IT IS FURTHER ORDERED, That the Secretary shall cause this order to be published in the Federal Register.

49. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this order to be served on each state commission.

FEDERAL COMMUNICATIONS COMMISSION*

William J. Tricarico
Secretary

**See attached separate statement of Commissioner Joseph R. Fogarty.*

Appendix A. Summary of Comments

1. AT&T argues that the Commission on reconsideration should find that state commissions are precluded from departing from the depreciation methods and rates established by this Commission in order to allow the carriers to achieve timely capital recovery. It views the *Premption Order* as a retreat from the Commission's competitive policies.

2. AT&T asserts that realistic depreciation rates are essential to attain accurate cost-based pricing decisions to prevent artificial barriers to competition, to foster technological innovation which will enhance network efficiency and the availability of competitive alternatives, to

facilitate the timely implementation of detariffing of customer premises equipment [1] and to insure the financial viability of the carriers. It contends that competitive conditions result in faster obsolescence and shorter asset lives, requiring that depreciation methods and rates be inseparable from ratemaking to insure capital recovery.

3. AT&T proposes two legal theories for preempting state commission action. First, it asserts that the Commission may preempt under Sections 1 and 2 of the Act, citing *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978), *NCUC II*, *NCUC I*, and *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976). It states that because of the central role depreciation, including the depreciation aspects of station connections, plays in the achievement of the Commission's policies, preemption is necessary to avoid interference with or frustration of these policies.

4. AT&T's second theory is that Section 220(b) preempts states on its face, asserting that in its earlier pleadings it did not rely on Section 220(g) as suggested by the Commission's decision. It argues that Section 220 gives the Commission discretion with respect to accounting rules, but does not give it such discretion with regard to depreciation prescriptions. AT&T states that the Commission's rule allowing carriers to subdivide an account to comply with a state commission order does not mean that a state can require capitalization when this Commission requires expensing. Finally, it submits that the Commission misread the legislative history of the Communicationns Act by failing to consider statements in the committeee reports and remarks of members at committee hearings that indicate Congress believed the Interstate Commerce Act provisions

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[1] It contends that different depreciation rates between jurisdictions will result in disagreements about net book value in deregulating CPE and that the application of the Separations Manual will create uncertainty as to which plant a particular book value relates.

from which Section 220(b) was taken did in fact preempt the states. See also *Depreciation Charges of Telephone Companies*, 118 I.C.C. 295 (1926).

5. GTE asserts that the Commission's policies in the areas of competition and faster capital recovery will be frustrated if the state commissions are allowed to depart from the depreciation rates and methods prescribed by the Commission. It contends that Section 220(b) preempts the states annd distinguishes Section 220(a) as being discretionary on the Commission and argues that the Commission focused only on the provisions of Section 220(a) in its earlier decision. It submits that there is no doubt that a state can require a carrier to keep additional records and memoranda. However, GTE argues that the Commission's decision is overly broad. It is clear, GTE contends, that the Commission can preempt inconsistent state action when it conflicts with national telecommunications policies, and it should do so in this case. GTE also argues that the legislative history and the rules of statutory construction indicate that Congress intended to preempt the states in the area of depreciation, submitting that property cannot be successfully depreciated at two different rates prescribed by different regulatory bodies because under or over recovery from one or the other jurisdiction will occur from the use of shifting usage factors.

6. The oppositions generally argue that the states have the jurisdiction to determine the extent to which intrastate rates reflect depreciation and expensing adjustments promulgated by the Commission. Sections 2(b) and 221(b) are cited as reserving jurisdiction over local and intrastate telephone rates to the states as intended by Congress when it distinguished between "interstate" and "intrastate" in Sections 1 and 2. Ohio argues that the preemption argument was rejected in the only case of which it is aware, *Pacific Telephone and Telegraph Company v. California*, 401 P.2d 353 (1965).

7. Ohio asserts that the courts have distinguished between ratemaking and interconnection policies, *NCUC II* and *NCUC I*, and submits that it is the ratemaking jurisdiction reserved to the states that is in question in this proceeding. To permit the Commission to prescribe depreciation rates applicable to all property whether used for interstate or intrastate services would, in Ohio's view, be equivalent to giving the FCC a hand in setting state rates.

8. Ohio is concerned that under some methods, such as remaining life, costs will not be charged to consumers who receive the benefits of the property being depreciated. Finally, it contends that Sections 220(i) and (j) are consistent with concurrent jurisdiction.

9. Ohio argues that GTE is attempting to have the Commission read Section 2(b) out of the Act, and asserts that it is inappropriate to ignore language in a statute, to extend a statute beyond its clear import, or to embrace subjects not specifically enumerated. Section 2(b)(1) is stated by Ohio to have been intended to reverse the Supreme Court decision in *Houston East and West Texas Ry. v. U.S.*, 234 U.S. 342 (1914), wherein the ICC was given the power to suspend intrastate rates enabling carriers to raise intrastate rates to federal levels for similar distances. NARUC and Ohio argue that Section 2(b) was intended to ensure that state jurisdiction was not limited by the 1934 legislation.

10. Several parties assert that there is considerable Commission precedent recognizing the states' independent ratemaking authority, including departures from Commission prescribed accounting, for intrastate rates. They note that the Commission has encouraged state commissions to devote more resources to depreciation matters, *Amendment of Part 31*, 83 FCC 2d 267 (1980) *recon.*, 87 FCC 2d 916 (1981), has recognized in this proceeding the state jurisdiction over expensing of station connections for state ratemaking purposes, has recognized divergent treatment

of interest during construction and has not contested California's use of remaining life for approximately thirty years. Ohio argues that there is nothing to suggest that there needs to be national uniformity in depreciation procedures and that local diversity is desirable, noting that even a GTE of Ohio witness in an Ohio rate case has indicated that local diversity in setting depreciation rates is preferable.

11. Ohio contends that *McDonnell Douglas Corp. v. General Telephone Company of California*, 594 F.2d 720 (9th Cir. 1979), recognized the validity of intrastate regulatory jurisdiction under the Act by finding that Congress in enacting Section 2(b) had intended to give states considerable power with respect to wire communications that are wholly intrastate in nature.

12. California argues that the Commission's refusal to preempt state power to prescribe depreciation rates for intrastate ratemaking purposes will not undermine the Commission's procompetitive policies or signal a retreat since many states have adopted policies that foster competition. AT&T's assertion that preemption must be exercised to promote procompetitive policies is rejected by NARUC as unsupported. It states that expensing of station connection costs can have no competitive effect because expensing is not the same as unbundling. Moreover, it contends that the Commission did not adopt remaining life and equal life group depreciation procedures to promote competition but, rather, to more properly time capital recovery and insure that any deficiency in past depreciation was adjusted. Finally, NARUC states that the speculative statements about the numbers of states that are not following the Commission's policies are inadequate to justify preempting state commission jurisdication on the theory that federal policies are being frustrated.

13. NARUC argues that the attempted distinction of Section 220(a) from Section 220(b) on the basis that Section

220(b) is mandatory while Section 220(a) is discretionary does not address the question of the preemptive effect of either section. It contends that neither reason nor case law provides support for asserting that preemption of state regulation of intrastate communications is automatic with respect to subject areas which the FCC must regulate on the interstate level. It further notes that the language of Section 220(b) does not differ significantly from that in Section 220(g) with respect to the effect of prescribed depreciation rates, accounts or records other than as prescribed by the Commission. NARUC states that the relationship between accounting and ratemaking is self evident and argues that state control over intrastate rates would have little vitality if state commissions were deprived of the power to disallow expenses and depreciation claimed by carriers. NARUC asserts that the fact that a proposed Section 220(j) that would have expressly reserved depreciation prescription powers to the states was not adopted does not mean that states must be bound by Commission depreciation prescriptions, stating that the final provision adopted was a compromise.

14. Consumers' Counsel supports the Commission's *Preemption Order* and generally cites from that *Order* in support of its position. Idaho also agrees with the conclusion of the Order and states that it believes that administrative costs of separate record keeping to meet state requirements will be small. Arkansas filed to indicate that its opinions had not rejected the new depreciation methods outright but had left the decision to individual cases for resolution.

15. AT&T's reply submits that the setting of depreciation rates does not constitute the exercise of jurisdiction with respect to charges for intrastate services. It argues that Section 2(b) does not deprive this Commission of jurisdiction over jointly used property where its regulation affects the conduct or development of interstate

communications. AT&T states that if a state utilized the depreciation rate prescribed by the Commission, it may make adjustments to the test period data to reflect concepts of used and useful property or other pro forma adjustments to reflect conditions during the period during which the tariff will be in effect.

16. AT&T distinguishes *Houston East and West Texas Ry. Co. v. U.S., supra*, by asserting that that case involved actual preemption of service rates. It notes that while Congress may have sought to reverse that decision in the communications field, the issue here is only the jurisdiction to prescribe depreciation rates. Thus, it contends that the case actually suggests that Section 2(b) should be narrowly interpreted. Moreover, while use of federally prescribed depreciation rates may significantly affect intrastate rates, the states remain free to price individual service rates. See *e.g., NCUC I.*

17. USITA submits that federal preemption of jurisdiction over depreciation rate prescriptions for carriers for which the Commission has prescribed depreciation rates would not interfere with state commission ability to set intrastate service rates in accordance with any ratemaking method desired. It contends that the setting of depreciation rates is not a ratemaking function pursuant to Sections 201-205, but is the exercise of a specific power granted to the Commission by Congress. USITA argues that divergent depreciation rates create confusion and raise problems of capital recovery.

18. GTE contends that state action whether in the nature of ratemaking or otherwise which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" will be preempted. *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 50 LW 4916, 4919 (1982). GTE concludes that the states do not have the power through the guise of ratemaking to negate FCC action designed to give effect to federal

statutory objectives. GTE does not challenge state rights pursuant to state statutes to regulate rates for intrastate services. It asserts that no preclusion of state ratemaking jurisdiction would result from FCC preemption under Section 220(b), although failure to preempt will endanger important national policies.

19. GTE submits that Section 220(b) charges the Commission with the responsibility of prescribing depreciation rates for carriers subject to the Act and recognizes only two exceptions. First, the Commission should act as soon as possible. Second, Section 220(h) recognizes that certain classes of carriers may be exempted. The Commission, according to GTE, has not exercised its authority pursuant to this provision in this proceeding. Finally, GTE argues that reliance on *NCUC I* and *NCUC II* as supporting a finding that the Commission cannot preempt state commission depreciation prescriptions for carriers subject to the Act is inconsistent with the holdings and analysis of those cases. AT&T and GTE submit that Section 221(b) is inapplicable because that provision was intended only to give states the jurisdiction to regulate local exchange service extending over a state boundary.

SEPARATE STATEMENT
OF
COMMISSIONER JOSEPH R. FOGARTY

In RE: Reconsideration of Docket No. CC 79-105.

Having dissented from the Commission's original decision declining to preempt State accounting and depreciation rules inconsistent with those prescribed by the FCC,[1] I am pleased that the Commission has reconsidered this issue and acted to preempt such inconsistent State regulation.

As this *Order* establishes in detail, a true reading of the statutory language and legislative history of Section 220(b) of the Communications Act clearly demonstrates that Congress intended FCC depreciation rules and policies to control the field.

Even if preemption were not explicitly mandated by Section 220(b), the effective implementation of our pro-competitive federal telecommunications policies dictates that inconsistent State depreciation regulation be preempted by this Commission. We cannot "defer to the States" on capital recovery issues. Telephone companies must be able to recover their cost of capital in a timely and effective manner if they are to price their services efficiently and to improve and expand their facilities to meet the challenges of competition and technologic innovation.

This preemption imperative is not merely theoretical. Too many States (e.g., Alabama, Louisiana, Nebraska, Ohio, New Jersey, Michigan, Arkansas) have already refused to recognize the critical necessity of the FCC's cost recovery principles. The resulting depreciation rate differentials are alarming: GTE of Ohio has indicated that it will be denied

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[1]Amendment of Part 31, Joint Dissenting Statement of Commissioners Joseph R. Fogarty and Anne P. Jones, 89 FCC 2d 1109-1111 (1981).

$7 million in capital recovery this year if the State of Ohio's disparate depreciation treatment is allowed to prevail.

The FCC cannot ignore the detrimental impacts of inconsistent State treatment of depreciation if our pro-competitive policies are to have any integrity and viability. This Commission now recognizes that preemption is both mandated as a matter of law and essential as a matter of policy, and our action today has my full endorsement and support.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Southwestern Bell Telephone Company Plaintiff

VS. No. LR C 84-247

Arkansas Public Service Commission, et al. Defendants

ORDER

The plaintiff sued for declaratory judgment and preliminary and permanent injunctive relief for the defendants' failure to comply with orders of the Federal Communications Commission (FCC) and with 47 C.F.R. §67.1 and the Separations Manual adopted by the FCC. The parties have submitted extensive briefs, stipulations and affidavits concerning all issues necessary for disposition of the case. Although no party has moved for summary judgment, the issues will be dispositive and judgment shall be entered in accordance with this order unless the parties raise new issues within ten days of this order.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337, and 47 U.S.C. § 401(b). Venue is proper in this district pursuant to 28 U.S.C. § 1391.

The ultimate issues of this case require initial resolution of the jurisdiction of the FCC. It must be noted that the FCC is not a party to this lawsuit, although joinder would have been proper since the plaintiff seeks to enforce orders and rules of the FCC. *See* 47 U.S.C. §§ 401, 402 and 411.

The defendants issued an order in a rate request by the plaintiff January 23, 1984, *In the Matter of Southwestern Bell Telephone Company for an Order Establishing and Implementing New Intrastate Rates, Tolls and Charges Applicable to Intrastate Telecommunications Services Furnished Within the State of Arkansas*, Arkansas Public Service Commission Doc. No. 83-045-U, Order No. 29. Although the plaintiff is scheduled for rehearing by the defendants and has not exhausted its state law appeals, it sued in federal court, alleging two counts: (1) that the defendants violated a valid preemption order of the FCC requiring them to determine intrastate telephone rates by using accelerated depreciation methods used by the FCC for interstate ratemaking purposes; and (2) that the defendants violated FCC-ordered allocation procedures for separating interstate and intrastate costs.

The defendants admit that the FCC has ordered them to use the accelerated depreciation methods, but insist that the FCC lacked jurisdiction to issue the order. They insist also that they are following the cost separations procedures of the FCC.

I. FCC Jurisdiction

Count I.—The Federal Communications Commission was established by the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, to regulate interstate and foreign communication. Congress expressly limited its jurisdiction, excluding regulation of intrastate communication. 47 U.S.C. § 152(b)(1). The FCC is authorized to determine depreciation rates for interstate carriers under 47 U.S.C. § 220(b). The FCC is authorized to exempt carriers such as the plaintiff

from any of its accounting requirements where they are concurrently regulated by state regulatory commissions. 47 U.S.C. § 220(h). Within a nine month period, the FCC interpreted § 220(b) to deny its jurisdiction over establishing depreciation rates for intrastate ratemaking, and then to grant such jurisdiction. *Compare Amendment of Part 31*, 89 F.C.C.2d 1094 (1982) *with Amendment of Part 31*, 92 F.C.C.2d 864 (1983) ("Preemption Order").

The Court has reviewed the FCC's analysis of the legislative history and is unpersuaded that the FCC has jurisdiction to determine intrastate depreciation methods. Although §220(b) is not *expressly* limited to interstate depreciation methods, this must be implied. The 1934 act left the door open for the FCC to ask Congress for additional authority under 47 U.S.C. § 220(j). In light of the express FCC jurisdictional *limitations* imposed by Congress, the FCC's interpretation of expanding jurisdiction is a non sequitur. The logic of expanding into intrastate jurisdictional matters in the name of "rapid, efficient, Nation-wide, world-wide wire and radio communication service with adequate facilities at reasonable charges" could, theoretically, allow the FCC to bootstrap itself into preempting *all intrastate* ratemaking determinations. 92 F.C.C.2d at 876 (citing 47 U.S.C. § 151). If the FCC wishes to have this authority, it should seek express congressional approval. The Court finds the FCC preemption of intrastate depreciation methods to be ultra vires and will not enforce it for the plaintiff.

Some mention has been made that only a court of appeals may invalidate an FCC order pursuant to 28 U.S.C. § 2342. However, 28 U.S.C. § 2342 is inapposite since this proceeding is not "any proceeding to enjoin, set aside, annul or suspend any order" of the FCC, making 47 U.S.C. § 402(a) applicable. Since the FCC is not a party, it will have no affect upon it. Further, determination of the issue is merely incidental to this lawsuit over which this Court has ample jurisdictional basis. If the FCC wishes to enforce its order, then it should take the appropriate steps.

Count II. —Unlike the depreciation issue of Count I, the FCC has full statutory authority, through the use of joint boards, for allocation of costs between interstate and intrastate jurisdictions where facilities are used for both purposes. 47 U.S.C. § 410.

II. Substantive Issues

Count I. —Since this Court finds that the FCC Preemption Order, 92 F.C.C.2d 864 (1983), is unenforceable, Count I must be dismissed and judgment entered for the defendants.

Count II. —There is no dispute between the parties that the defendants must follow the separations procedures established by the FCC. There are three primary issues over compliance with those procedures: (1) whether the defendants improperly reallocated open end traffic sensitive costs and closed end non-traffic sensitive costs associated with foreign exchange/common control switching arrangement (FX/CCSA) services, and from intrastate to interstate jurisdiction; (2) whether the defendants improperly reallocated open end non-traffic sensitive costs of FX/CCSA services from intrastate to interstate jurisdiction; and (3) whether the defendants properly refused to use updated operator work time studies in computing intrastate rates.

Issue (1): The defendants' January 23, 1984, order resulted in a shift of cost allocation from intrastate to interstate jurisdiction. The defendants admit that their order was in technical violation of an FCC "Freeze Order", *Amendment of Part 67*, 89 F.C.C.2d 1 (1982), which froze the **subscriber plant factor (SPF), a multiplication factor used** for determining the proper allocation of costs from facilities used for both intrastate and interstate traffic. Since the defendants' order was issued, however, the FCC amended the factor to include these two modifications made by the defendants. The amendment to the Separations Manual

shall become effective April 3, 1984. *In the Matter of Amendment of Part 67*, Order FCC 83-564 (adopted December 1, 1983, and released February 14, 1984). The issue remaining is whether a violation for ten weeks results in injury to the plaintiff. If so, then an appropriate remedy must be fashioned.

Issue (2): The determination of whether the defendants improperly reallocated open end non-traffic sensitive costs of FX/CCSA services to interstate costs depends upon whether the allocation was proper prior to the FCC Freeze Order, *Amendment of Part 67*, 89 F.C.C.2d 1 (1982). The defendants insist that the adjustments were in effect prior to the order. The parties stipulated that the adjustment to reallocate the costs to the interstate jurisdiction was made by the defendants in Order No. 12, APSC Doc. No. U-3117 (August 6, 1981). The same allocation was made in Order No. 11, APSC Doc. No. 82-037-U (November 29, 1982), and in the Januuary 23, 1984, order. The 1981 allocation under APSC Doc. No. U-3117 is pending decision on appeal to state court. Even if this allocation was originally proper, the issue remains whether it is valid after the freeze order.

Issue (3): The plaintiff maintains that the updated operator work time figures (OWT) should have been accepted by the defendants. The plaintiff frames the issue in terms of whether the defendants must accept updated figures or whether the OWT figures were frozen at the time in 1970 when the last Separations Manual was published. The defendants concede that they must accept updated OWT figures, and admit that they *have* accepted such updated figures in the past. The defendants frame the issue in terms of whether the plaintiff laid the proper evidentiary foundation for them to accept the numbers proposed by the plaintiff.

III. Exhaustion of Administrative Remedies and Absentention Doctrines

All of the issues raised by Count II raise broader issues of exhaustion of administrative remedies and abstention. Both doctrines have forceful support in this case. A collateral attack in federal court should not be used to unnecessarily subvert established state and federal administrative procedures. Primary jurisdiction for interstate/intrastate cost allocation or "separations" issues lies with the FCC and joint boards appointed by the FCC.

Exhaustion of administrative remedies is normally required before judicial relief is available. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980); *Darr v. Carter*, 640 F.2d 163 (8th Cir. 1981). The balancing test for an exception to this requirement is discussed in *West v. Bergland*, 611 F.2d 710 (8th Cir. 1979). If the "litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further," then no exhaustion of administrative remedies is required. *Id.* at 715 (citing *United States v. Newmann*, 478 F.2d 829, 831 (9th Cir. 1973)). The governmental interests include (1) allowing the agency to "perform functions within its special competence", including "specialized fact-finding", "interpretation of disputed technical subject matter," and "resolving disputes concerning the meaning of the agency's regulations; (2) "discouraging 'frequent and deliberate flouting of the administrative process' "; (3) "allowing the agency to have the first opportunity to develop the facts and apply the law it was designed to administer"; and (4) "allowing agencies to correct their own errors, and in so doing moot controversies and obviate judicial review." *Id.* at 715, 716. This case presents compelling circumstances for requiring exhaustion of administrative remedies with the FCC and upon rehearing by the defendants. The factual complexities of interstate and intrastate ratemaking are best resolved by those with that area of expertise.

The individual's interest in the balancing test requires "exceptional circumstances", generally by establishing "irreparable injury" or "inadequate remedy". *Id.* at 718. Unreasonable delay by the administrative agency may establish irreparable injury, but there is no showing that such a delay is expected to occur he *See Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587 (1926). In short, the plaintiff has not established that there are any exeeptional circumstances why issues of *compliance* with the FCC ordered separations should not be first addressed to the FCC. The statutory scheme states that "*any*" proceeding regarding the jurisdictional cost separations may be referred to a joint board by the FCC. 47 U.S.C. § 410(c). This would appear to include compliance issues. Thus, when the government's interest is weighed with the plaintiff's interest, the scales tip dramatically in favor of the government and require exhaustion of administrative remedies. The plaintiff has cited and supplied copies of cases decided by the FCC which resolve such issues. Where the FCC has clear jurisdiction, as it does over Count II issues, it should be consulted before going to federal court.

Further, a persuasive argument for abstention on the Count II issues can be made. Evidentiary questions and policy issues, such as the amount and method of recovery of inadequately set rates, should not be resolved in a collateral attack in federal court, but rather through normal state appeal. The Arkansas legislature has specifically addressed the policy issue of how utilities should recover when the rates set by the defendants are determined inadequate on appeal or rehearing. Ark. Stat. Ann. § 73-217 (Supp. 1983). Abstention on these issues is justified as a matter of federal discretion and comity in state regulatory matters. *Alabama Comm'n. v. Southern R. Co.*, 341 U.S. 341 (1951); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

IV. Preliminary Injunction Relief

The requirements for a preliminary injunction in this case will be addressed briefly, although the discussion is un-

necessary since Count I is dismissed for lack of FFC jurisdiction, and Count II is dismissed under the doctrines of exhaustion of administrative remedies and abstention. The parties have addressed two tests for injunctive relief: (1) statutory test under 47 U.S.C. § 401(b); and (2) common law test under *Dataphase Systems, Inc. v. C L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981).

(1) 47 U.S.C. § 401(b) provides injunctive relief if an "injured" party applies to district court and shows that an FCC order was "regularly made", "duly served" and disobeyed. Since there was no jurisdiction for the FCC to require accelerated depreciation rates for intrastate purposes, the order could not have been "regularly made" as a matter of law for Count I. The parties stipulated that the preemption order was "regularly made", but the Court interprets this stipulation to mean the order was "regularly made" only in a procedural sense, since the defendants clearly have objected to the FCC's jurisdiction. The plaintiff would have to establish "disobedience" for preliminary injunctive relief under Count II. This is unnecessary in light of the judicial doctrines discussed.

The parties have discussed the injury requirement extensively. The plaintiff maintains that it has incurred real financial and competitive losses due to the defendants' action which cannot be recovered under the Arkansas statutory provision, Ark. Stat. Ann. § 73-217 (Supp. 1983). The defendants insist that this statute allows full recovery and attack the claimed losses. These factual issues need not be resolved at this time, but it appears that the plaintiff is "injured" within the meaning of the statute.

(2) *Dataphase* Test. The traditional test for a preliminary injunction in this circuit requires evaluation of (a) the threat of irreparable harm to the plaintiff; (b) the balance of the plaintiff's harm with the injury to the other parties from the injunction; (c) the plaintiff's probabiliity of success on the merits; and (d) the public interest.

Dataphase, supra, 640 F.2d at 114. There is a *threat* of irreparable harm to the plaintiff, although disputed. No real injury to the defendants would occur. The plaintiff has no probability of success on Count I, and only limited probability of success on Count II. The public interest would weigh heavily on the side of the defendants, and not on the side of the plaintiff. The plaintiff would fail the *Dataphase* test.

V. Conclusion

The Court concludes that Count I should be dismissed for lack of FCC jurisdiction in issuing the Preemption Order of January 6, 1983, 92 FCC 2d 864, which required state regulatory commissions to use FCC ordered accelerated depreciation methods for intrastate ratemaking purposes. Count II shall be dismissed under the judicial doctrines of exhaustion of administrative remedies and abstention.

Either party may raise additional issues or make submissions necessary to complete the record for appeal within ten days. If no additional pleadings are submitted within that period, summary judgment shall be entered for the defendants and the case dismissed.

Ordered this March 30, 1984.

/s/ William R. Overton

United States District Judge

United States Court of Appeals
For the Eighth Circuit

No. 84-1488

Southwestern Bell Company,	*	
Appellant,	*	
v.	*	Appeal from the United States District Court for the Eastern District of Arkansas.
Arkansas Public Service Commission; Robert E. Johnston, Commissioner; Patricia S. Qualls, Commissioner; and James W. Daniel, Commissioner.	*	
Appellees.	*	

Submitted: May 17, 1984
Filed: June 7, 1984

Before HEANEY, BRIGHT and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The Arkansas Public Service Commission denied a rate application filed by Southwestern Bell Telephone Company and, in doing so, refused to follow an order of the Federal Communications Commission mandating specific accelerated depreciation methods for intrastate ratemaking. Southwestern Bell then sought to enjoin the Arkansas

Commission's disobedience of the FCC order under 47 U.S.C. § 401(b) (1976). The district court denied Southwestern Bell's petition on the grounds that the order was ultra vires because the FCC lacked authority to prescribe depreciation methods for the intrastate portion of property used in providing telephone service. On appeal, Southwestern Bell argues that the district court was without jurisdiction to determine the validity of the FCC order and that it erred in denying injunctive relief. We reverse and remand with directions that the district court enjoin the Arkansas Commission from continued disobedience of the FCC order.

A 1980 order of the FCC established certain depreciation rates and methods for the interstate operations of tel phone companies. *Report and Order*, 83 F.C.C.2d 267 (1980). *reconsidered*, 87 F.C.C.2d 916 (1981). The FCC subsequently clarified its order by announcing that state regulatory commissions were not preempted from adopting inconsistent depreciation methods for purposes of intrastate ratemaking. *Memorandum Opinion and Order*, 89 F.C.C. 2d 1094 (1982). Within nine months, however, the FCC reversed its position and announced that state commissions were preempted from utilizing depreciation methods different from those mandated by the FCC. *Memorandum Opinion and Order*, 92 F.C.C. 2d 864 (1983) (Preemption Order). In reversing its position, the FCC concluded that the language and legislative history of 47 U.S.C.

§ 220(b) (1976),[1] along with its authority to preempt state actions that interfere with federal policies and objectives,[2] empowered it to "preempt inconsistent state depreciation policies and rates." *Preemption Order* at 880. A later FCC order prescribed Equal Life Group and Remaining Life depreciation methods, and attached a schedule based on these methods to be used by Southwestern Bell in Arkansas. *Order*, No. 83-587 (Dec. 20, 1983).

The Arkansas Commission was one of several interested parties which filed comments that were considered by the FCC before it issued the Preemption Order. The validity of the Preemption Order is on appeal to the United States Court of Appeals for the Fourth Circuit. *Virginia Corp. Comm. v. FCC*, No. 83-1136 (4th Cir. filed Feb. 18, 1983).[3] The parties have stipulated that the

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[1]47 U.S.C. § 220(b) provides as follows:

> (b) The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the clasess [sic] of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

[2]47 U.S.C. § 151 (1976) provides in part that the FCC was created to "make available, so far as possible , to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, ..."

[3]Oral argument was heard on October 7, 1983.

Arkansas Commission is a party to the Fourth Circuit appeal and has taken no steps to stay the Preemption Order while the appeal is pending.[4]

On March 23, 1983, Southwestern Bell filed with the Arkansas Commission an application for a rate increase for its intrastate services. Part of its request was based on the increased depreciation expenses resulting from the FCC's Preemption Order. The Arkansas Commission rejected Bell's application, stating that

> [u]ntil such time as this matter is finally resolved in the Federal Courts or by the United States Congress we stand firm in our conviction and belief that the FCC does not have the lawful right to exercise preemption over intrastate depreciation rates.
>
> ....
>
> We believe that we have not lawfully been preempted by the FCC, therefore, we are not bound to adopt the depreciation methods prescribed by the FCC, but rather are free to adopt whatever depreciation methods we feel reasonable and justified.

In Re Application of Southwestern Bell Telephone Co., No. 83-045-U at 15-16, 18 (Jan. 23, 1984).

On March 9, 1984, Southwestern Bell filed a complaint in district court. It sought a declaratory judgment that the Arkansas Commission's refusal to abide by the Preemption Order was unlawful and to enjoin it from using any depreciation methods other than those prescribed by the FCC.[5] The district court denied the relief sought by

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[4]The reviewing court has authority to stay an FCC order pending judicial review. 28 U.S.C. § 2349(b) (1982).

[5]Southwestern Bell's complaint also contained a second count seeking the same relief from the Arkansas Commission's transfer of certain revenue requirements to interstate jurisdiction. This issue is not before us on this appeal.

Southwestern Bell. It held that the Preemption Order was ultra vires because the FCC lacked jurisdiction to preempt inconsistent depreciation rates for intrastate ratemaking. It denied injunctive relief under 47 U.S.C. § 401(b)[6] on the grounds that an ultra vires order cannot be "regularly made" within the meaning of that statute. The district court also examined Southwestern Bell's request for injunctive relief under the traditional equitable analysis. *See Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981). It held that Bell failed this standard for two reasons: (1) it had no probability of success on the merits because the FCC order was ultra vires and (2) the public interest factor weighed heavily on the side of the Arkansas Commission. This appeal followed. We set an expedited briefing schedule and heard oral argument on May 17, 1984.

I.

Under 28 U.S.C. § 2342(1) (1982), the courts of appeals are given exclusive jurisdiction to "enjoin, set aside, suspend . . . , or to determine the validity of all final orders of the Federal Commission . . . ." *City of Peoria v. General Elec. Cablevision Corp.*,690 F.2d 116, 119 (7th Cir. 1982); *City of Rochester v. Bond*, 603 F.2d 927, 934-35 (D.C. Cir. 1979). The Supreme Court recently confirmed the primacy of appellate court jurisdiction under section 2342(1). *FCC v.*

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[6]47 U.S.C. § 401(b) provides as follows:

> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

ITT World Communications, Inc., 52 U.S.L.W. 4507 (Apr. 30,, 1984). This decision makes clear that litigants may not evade the requirements of section 2342(1) and 47 U.S.C. § 402(a) (1976)[7] by requesting the district court "to enjoin action that is the outcome of the agency's order." *ITT World Communications*, 52 U.S.L.W. at 4509.

While *ITT World Communications, supra*, was decided after the district court decision, the Arkansas Commission nevertheless argues that the district court had jurisdiction to declare the Preemption Order ultra vires.[8] It contends that section 2342 and *ITT World Communications* are inapplicable because the present case does not involve an action to enjoin or set aside an agency action. The Arkansas Commission points out that in *ITT World Communications*, the action was not brought under statutes specifically granting the district court subject matter jurisdiction. This case, however, was brought under section 401(b) which specifically grants the district court jurisdiction to enforce FCC orders. The Arkansas Commission further argues that the specific grant of jurisdiction provided under section 401(b)[9] permits the district court to consider the validity

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[7]47 U.S.C. § 402(a) provides as follows: "Any proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28."

[8]The district couurt acknowledged section 2342 in its order, but held it inapposite since the proceeding was not one to enjoin, set aside, annul, or suspend an order of the FCC.

[9]In addition to section 401(b), Southwestern Bell brought its action under 28 U.S.C. §§ 1331, 1337, 2201 and 2202 (1983). The Arkansas Commission asserts that the district court possessed ancillary jurisdiction incident to each of these statutes. Our disposition of its argument under section 401(b) applies with equal force to each of the remaining statutes.

of the Preemption Order under the doctrine of ancillary jurisdiction.[10]

We reject the argument that the district court possessed ancillary jurisdiction incident to section 401(b). It is well established that where a statute specifically provides for exclusive jurisdiction in one court, as 28 U.S.C. § 2342 does, the specific grant of jurisdiction takes precedence over a general grant of jurisdiction. *See, e.g., Assure Comp. Transp., Inc. v. United States*, 629 F.2d 467, 471 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981); *City of Rochester v. Bond*, 603 F.2d at 935; *Inv. Co. Inst. v. Fed. Reserve Sys.*, 551 F.2d 1270, 1279 (D.C. Cir. 1977); *United States v. Southern Ry. Co.*, 364 F.2d 86, 91-92 (5th Cir. 1966), *cert. denied*, 386 U.S. 1031 (1967). The specific grant of exclusive jurisdiction in the courts of appeals for review of FCC orders precludes the district court from exercising ancillary jurisdiction to determine the validity of the Preemption Order.

The argument that section 2342 and *ITT World Communications* are inapplicable to the present case is also without merit. Although Southwestern Bell did not bring this action as one to enjoin or set aside an agency order, the Arkansas Commission's defense was the invalidity of the Preemption Order. Where the practical effect of a successful attack on the enforcement of an order involves a determination of its validity, the statutory procedure for

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[10]The Arkansas Commission also contends that district courts possess jurisdiction to attack the validity of administrative rulings that are ultra vires of the agency's authority under the patent violation doctrine established in *Leedom v. Kyne*, 358 U.S. 184 (1958). In *Leedom*, the district court was found to have jurisdiction on the ground that the National Labor Relations Board's action was in violation of an explicit statutory requirement. *See Indep. Cosmetic Mfgrs. v. Dep't of Health, Education & Welfare*, 574 F.2d 553 (D.C. Cir. 1976), *cert. denied*, 439 U.S. 893 (1978). We cannot conclude that the Preemption Order constitutes a patent violation of the FCC's authority.

review provided by Congress remains applicable.[11] *Cf. B.F. Goodrich Co. v. Northwest Industries, Inc.*, 424 F.2d 1349, 1353-54 (3rd Cir. 1970), *cert. denied*, 400 U.S. 822 (1970) (statutory procedure for review of ICC orders is applicable so long as the practical effect of a successful suit "would contradict or countermand a Commission order."); *Simpson v. Southwestern R.R. Co.*, 231 F.2d 59 (5th Cir.); *cert. denied*, 352 U.S. 828 (1956) (statutory procedure for review of ICC orders is applicable even where suit is one to enjoin action *authorized* by the Commission rather than one to enjoin an order of the Commission) (emphasis in original).

Where exclusive jurisdiction is mandated by statute, a party cannot bypass the procedure by characterizing its position as a defense to an enforcement action. The exclusive jurisdiction of the courts of appeals cannot be evaded simply by labeling the proceeding as one other than a proceeding for judicial review. *Cf. Minnesota v. O'Neil*, 472 F. Supp. 905, 908 (D. Minn. 1979) (where exclusive jurisdiction is provided by statute, plaintiff cannot bypass the procedure "by labeling its requested relief 'mandamas.' "). In determining that the Preemption Order was ultra vires, the district court countenanced just such an evasion.

The exclusive review procedure provided for by Congress in section 2342 serves important policy considerations. It insures that review will be vested in an appellate panel and not in a single district judge. It guarantees that

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[11]Six district courts have enjoined state regulatory commissions from disobeying the Preemption Order under section 401(b), and have properly declined to review the Orders validity. *Mountain States Tel. & Tel. Co. v. Dep't of Public Serv. Regulation*, No. CV-83-177-H (D. Mont. Aug. 22, 1983); *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, No. 83-4090 (D. Kan. Apr. 8, 1983); *South Central Bell Tel. Co. v. Louisianna Public Service Comm'n.*, 570 F. Supp. 227, 233 (M.D. La. 1983); *New England Tel. & Tel. Co. v. Public Utilities Comm'n of Maine*, 570 F. Supp. 1558, 1577, 1581 (D. Me. 1983); *Chesapeake & Potomac Tel. Co. v. Public Service Comm'n.*, 560 F. Supp. 844, 848-49 (D. Md. 1983); *Pacific N.W. Bell Tel. Co. v. Washington Utility and Transp. Comm'n.*, 565 F. Supp. 17, 21 (W.D. Wash. 1983).

agency action will be reviewed on the basis of the administrative record rather than a district judge's de novo fact-finding. It also avoids the possibility of conflicting litigation where two courts have concurrent jurisdiction to resolve the same issues.[12] The legislative history of section 2342 also demonstrates that one of its purposes was to eliminate the duplication of effort that resulted under prior law when appeals from agency orders were tried de novo in the district courts. H. Rep. No. 2122, 81st Cong., 2d. Sess. 3-4 (1950). Allowing the Arkansas Commission to interpose its defense of invalidity in this section 401(b) enforcement action would compromise all of these policy concerns. *Cf. Tampa Phosphate R.R. Co. v. Seaboard Coast Line R.R. Co.*, 418 F.2d 387, 399 (5th Cir. 1969) *cert. denied*, 397 U.S. 910 (1970) (the invalidity of an ICC order was not reviewable by a single-judge trial court when statutory provisions governing review confined such challenges to a three-judge court.) This is especially true in the present case. The Arkansas Commission intervened in the Fourth Circuit appeal,[13] but did not request a stay of the Preemption Order. Instead, in response to Southwestern Bell's rate application, it expressly defied the Order, and later raised its invalidity as a defense to Southwestern Bell's enforcement action. If the district court could exercise jurisdiction in these circumstances, then the application of section 2342 could be consistently avoided simply by waiting until an en-

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[12]*See generally Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 Harv. L. Rev. 980, 983-85 (1975).

[13]The Arkansas Commission argues that it was not a party to the FCC proceeding nor to the appeal to the Fourth Circuit. The record reveals otherwise. The Arkansas Commission filed comments in the FCC proceeding which resulted in the Preemption Order and stipulated that it intervened and is a party to the Fourth Circuit appeal. It participated in arguments made by twenty other state regulatory commissions in that appeal. We think it clear, therefore, that the Arkansas Commission was a party to the FCC proceeding and is a party to the appeal. *See Port of Boston Marine Terminal Assn. v. Rederi. Transatlantic*, 400 US.. 62, 71-72 (1970).

forcement action is brought in the district court and then interjecting what amounts to an action for review as a defense. This would undermine the judicial structure Congress created when it enacted section 2342.

The Arkansas Commission also contends that the district court may determine the validity of the FCC order in an enforcement proceeding because 47 U.S.C. § 401(b) requires the district court issuing an injunction to determine whether the FCC order was "regularly made." The Arkansas Commission argues that "regularly made" requires both procedural and substantive regularity. We believe that the term "regularly made" as used in section 401(b) refers only to procedural regularity; otherwise, the exclusive provision of the statutory review procedure set forth in 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a) would be superfluous. *See South Central Bell Tel. Co.*, 570 F. Supp. at 233-34; *New England Tel. & Tel. Co.*, 570 F. Supp. at 1574; *Chesapeake & Potomac Tel. Co.*, 560 F. Supp. at 848.

FCC orders become effective upon issuance unless stayed by the FCC or a reviewing court. 47 U.S.C. § 408 (1976). The FCC is not required to seek enforcement of its orders before they become effective. Therefore, the Preemption Order was binding on the Arkansas Commission and was to be accorded the same preemptive effect as federal statutes. *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153 (1982). The district court had no jurisdiction to deny enforcement of the FCC order on the basis that it was ultra vires.

II.

47 U.S.C. § 401(b) provides that any party injured by a person's failure to obey an FCC order may apply to a district court for enforcement of that order. Such enforcement may be by "writ of injunction or other proper process" upon a finding that the order was (1) regularly made; (2) duly served; (3) disobeyed; and that (4) a party was

thereby injured. The district court examined Southwestern Bell's petition for injunctive relief under both section 401(b) and the traditional equitable analysis enumerated in *Datanhase Systems*, 640 F.2d at 113. It concluded that Southwestern Bell's petition failed under both standards. We believe that only the statutory criteria need be satisfied and that the traditional equitable standard is not applicable where, as in this case, we have a clear violation of a self-executing order of an administrative agency. *see* 47 U.S.C. § 408, which is accorded the same preemptive effect as a federal statute, *Fidelity Federal Savings & Loan Assn., supra* and where substantive review of that order is vested in another court, *see* 28 U.S.C. § 2342(1), 47 U.S.C. § 402(a). *Cf. United States v. City and County of San Francisco*, 310 U.S. 16, 30 (1940) (city's violation of restriction attached to land grant may be enjoined under enforcement provision without "a balancing of equities or . . . the invocation of the generalities of judicial maxims . . . ."). Congress has specifically created in section 401(b) an exclusive mechanism for enforcing FCC orders, and, under these circumstances, it must be used.

The parties stipulated that the FCC order was "regularly made and duly served." The district court concluded that "regularly made" includes the substantive requirement that the FCC have jurisdiction to issue the order. As we have demonstrated, the district court erred in reaching this conclusion, and therefore the stipulation between the parties satisfies the first and second criteria of section 401(b). The Arkansas Commission unilaterally concluded that the FCC lacked jurisdiction and deliberately disobeyed the Preemption Order.[14] Finally, the district

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[14]*See* page 4, *supra*.

court concluded, and we agree, that Southwestern Bell is both a party and is suffering injury[15] within the meaning of Section 401(b).

Once the four elements of section 401(b) are satisfied, the statute directs that "the court *shall* enforce obedience to such order by a writ of injunction or other proper process . . . ." (emphasis suppliied). We do not read "shall" as withholding all discretion from the district court with respect to issuance of the injunction. *Hecht Co. v. Bowles*, 321 U.S. 321 (1944). Under the circumstances of this case, however, we conclude that denial of injunctive relief would be an abuse of discretion.

As indicated previously, the Arkansas Commission filed comments with the FCC. It stipulated that it is a party to the Fourth Circuit appeal and did not request a stay of the Order.[16] The Arkansas Commission then adopted depreciation methods inconsistent with those required by the Order. The Arkansas Commission's order responding to Southwestern Bell's application for a rate increase demonstrates studied consideration of its defiance of the Preemption Order. This is disobedience that section 401(b)

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[15]Section 401(b) requires only that a party be injured by disobedience to an FCC order. The traditional equitable criterion of irreparable injury is thus inapplicable. *Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d 255 (10th Cir. 1981). The record reveals that if Southwestern Bell is permitted to adopt FCC-mandated depreciation methods, its yearly intrastate revenue requirement would increase by approximately $11,256,223. We further note that the current loss of funds is especially critical because of competitive pressures resulting from the restructuring of the telephone industry. It is also clear that Southwestern Bell suffers injury by being forced to observe two contradictory sets of regulations, thus exposing it to potential penalties for noncompliance. *See Public Utilities Comm's of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 469 (1943). Under these circumstances, Arkansas' retroactive recovery statute, which entitles a public utility to collect with interest revenues that were unlawfully withheld, does not insulate Southwestern Bell from injury in the present case. *See* Ark. Stat. Ann. §73-217(c)(ii) (Supp. 1983).

[16]J.A. at 253 (Stipulation No. 11).

was clearly designed to remedy. In view of this conduct, and as the elements of section 401(b) have been satisfied, we believe that it would be an abuse of discretion to deny equitable relief to Southwestern Bell. We conclude that the proper procedure is to remand to the district court with instructions to enter the injunction. *See Thornton v. Carter*, 109 F.2d 316, 319 (8th Cir. 1940).

The validity of the FCC's order is currently before the Fourth Circuit. We express no opinion on the issues that will be properly determined by that court. Accordingly, we direct that the district court enter its order enjoining the Arkansas Commission from refusing to follow the FCC order until such time as the Fourth Circuit has issued its decision. At that time, the district court should consider further relief consistent with the Fourth Circuit's decision. If the FCC's order is found to be valid, a permanent injunction may be required. If found to be invalid, and Southwestern Bell has collected increased revenues on the basis of the order, it may be required to refund such overpayments.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
For the First Circuit

No. 83-1779

New England Telephone and Telegraph Company, etc.,
Plaintiff, Appellee,

v.

Public Utilities Commission of Maine, et al.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MAINE
(Hon. Gene Carter, *U.S. District Judge*)

Before
Campbell, *Chief Judge*,
Breyer, *Circuit Judge*,
and Gierbolini,* *District Judge*

William E. Furber, with whom *Charles F. Dingman*, *Cushing P. Samp*, *Joseph G. Donahue*, *Peter L. Murray*, and *Murray, Plumb & Murray* were on brief, for appellants.

Francis X. Bellotti, Attorney General, and *Charles R. Peck*, Assistant Attorney General, Commonwealth of Massachusetts, Utilities Division, Public Protection Bureau, on brief for the Attorney General for the Commonwealth of Massachusetts, amicus curiae.

Robert A. Lewis, with whom *Ralph I. Lancaster, Jr.*, *Everett P. Ingalls*, and *Pierce, Atwood, Scribner, Allen, Smith & Lancaster* were on brief, for New England Telephone and Telegraph Company.

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*Of the District of Pureto Rico, sitting by designation.

June 29, 1984

BRYER, *Circuit Judge.* In this case a private party seeks to enforce a decision of the Federal Communications Commission against a recalcitrant state utilities commission. The FCC promulgated a rule that required state public utility commissions to follow a certain method for calculating depreciation of telephone company equipment. The Public Utilities Commission of Maine ("the P.U.C.") evidently ignored the FCC rule. The private party, namely the New England Telephone Company, invoking the authority of section 401(b) of the Federal Communications Act, 47 U.S.C. § 401(b), obtained a federal district court injunction requiring the Maine commission to comply with the FCC rule. 570 F. Supp. 1558 (D. Me. 1983). Section 401(b) of the Act states that if anyone

> fails or neglects to obey any order of the [Federal Communications] Commission . . . , any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order.

We find that the word "order" in this statute does not include an FCC rulemaking decision of the sort here at issue. Thus, the district court lacked authority to issue the injunction.

I

We start by examiniing the FCC decision at issue. The decision focused upon the question of how to recapture through depreciation charges the cost of a telephone company asset that has unexpectedly lost some of its anticipated economic value. (For a general description of cost recovery through regulated rate-setting, see *Distrigas of Massachusetts Corp. v. FERC*, No. 83-1633 (1st Cir. June 14, 1984.) To take an oversimplified, imaginary example to illustrate the problem, suppose that the telephone company

originally thought that some connecting equipment (say, a $50 fuse) installed in 1960 on the line between a house and a street pole would last fifty years. The company might initially depreciate the equipment at the rate of $1 per year. Suppose further that in 1980, after the company has recaptured $20 through depreciation charges, a new, dirt cheap, technological development makes it sensible to replace the fuse in 1985, instead of in the year 2010. How should the company recapture the remaining $30 of its original equipment cost? One depreciation method, called the "whole life" method, would have the company recalculate the annual depreciation charge for future years by dividing the original $50 cost by the newly estimated whole life of the asset (25 years). Thus, for the next five years, the company would charge $2 per year. By 1985, the company, then, would have recovered $30 of its $50 investment; the remainder would be recovered after the fuse was taken out of service. Another method, called the "remaining life" method, would have the company recalculate the annual depreciation allowance by dividing the remaining undepreciated cost of the fuse ($30) by its remaining useful life. So, the company would charge $6 per year for the years 1981 to 1985, reccovering the total cost by the time the fuse was retired from service.

The economic implications of the choice between these methods are likely to be complex and may be of great importance. *See generally* Cornell, Pelcovits, & Brenner, *A Legacy of Regulatory Failure*, Regulation, July/Aug. 1983, at 37; Fogarty, *Capital Recovery: A Crisis for Telephone Companies, A Dilemma for Regulators*, Pub. Util. Fort., Dec. 8, 1983, at 13. The "remaining life" method, for example, apparently means that consumers will have to pay more in the near future, but less in the more distant future. Moreover, there are those who argue that in the newly deregulated telephone world, the foreseeably longterm higher "phantom" depreciation charge resulting from the whole life approach (say, $2 extra per year from 1985 to 1995 to recover for the replaced fuse) could lead important

customers to switch from the regular telephone system to other lower priced (but economically more costly) systems. If so, customer desertion could deprive the regular system of important sources of revenue and burden remaining customers with still higher charges.

Whether or not these concerns are accurate, the fact is that in 1980 the FCC announced that it would switch from "whole life" to "remaining life" depreciation methods. *In re Amendment of Part 31, etc.*, 83 FCC 2d 267 (1980), *reconsidered*, 87 FCC 2d 916 (1981). And in December 1982 it ruled that New England Telephone and certain other phone companies must use "remaining life" systems in setting their *inter*state rates. *In re Prescription of Revised Percentages of Depreciation, etc.*, 92 FCC 2d 920 (1982). It expressly said, however, that it would determine the applicability of its choice of methodologies to *intra*-state rates (the subject now before us) in a "separate proceeding." *Id.*, at 928-29.

The "separate proceeding" was a rule-making proceeding, which initially involved a different depreciation question, namely whether certain telephone assets should be depreciated or treated as current expenses. *In re Amendment of Part 31, Uniform System of Accounts, Etc.*, Docket No. CC 79-105. The FCC concluded that some of the assets should be charged as current expenses, at least insofar as *inter*state rates were concerned. 85 FCC 2d 818 (1981), *clarified as only affecting interstate rates*, 89 FCC 2d 1094 (1982). Several phone companies then asked the FCC to reconsider whether it should not apply its rule to *intra*-state rates as well.

In the meantime, an Ohio telephone company asked the FCC for a "declaratory ruling" that the Commission's newly announced preference for a "remaining life" depreciation system applied to *intra*-state, as well as to *inter*state, rates and preempted contrary preferences of state regulatory commissions. The FCC evidently believed that the Ohio case and the *Part 31* case reconsideration both involved the

same general question, whether the FCC should require state commissions to apply FCC depreciation policies in intra-state ratemaking. Hence, it consolidated the two proceedings.

In January 1983 the FCC announced its decision in the (now consolidated) *Part 31* reconsiderations. 92 FCC 2d 864 (1983). It held that its methods for calculating depreciation were automatically binding upon the state commissions under the Communications Act, 47 U.S.C. § 220(b). It added that, in any event, even if the federal Act did not *automatically* preempt the right of state commissions to follow different depreciation methods for intra-state transactions, the Commission could (and did) forbid their doing so, for a nationally uniform depreciation policy was of great importance to a sound national communications policy. The Maine P.U.C. was not a party to the *Part 31* reconsideration proceeding, but some other state regulatory commisssions were, and several of these commissions have appealed the FCC's ruling to the Fourth Circuit, where the case awaits decision. *Virginia State Corporation Commission v. FCC*, No. 83-1136 (4th Cir.).

In April 1983, three months after the FCC's consolidated *Part 31* reconsideration decision, the Maine P.U.C. denied New England Telephone a rate increase in part because the increase rested upon the use of "remaining life" depreciation. The Maine commission decided that the FCC decision was unlawfuul—that the FCC could not tell it what depreciation methods to use. New England Telephone appealed the P.U.C.'s decision to the Maine Supreme Judicial Court, but it did not raise the "remaining life" issue in its appeal. Instead, it went to federal court, under 47 U.S.C. § 401(b), arguing that the Maine commission's definance of the FCC was unlawful and should be enjoined. The federal district court agreed. The Maine P.U.C. now appeals its decision.

II

The FCC decision at issue is the product of a rulemaking proceeding, namely the *Part 31* reconsideration. *See* pages 19-20 *infra*. The decision also fits the Administrative Procedure Act's definition of a "rule:" It is "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy . . . " 5 U.S.C. § 551(4). Hence, we consider it to be a rule. And, we ask whether such a rule can also be considered an "order of the Commission" within the terms of section 401(b) of the Communications Act. We note that several other courts have been asked to enforce the preemptive effect of the FCC's *Part 31* reconsideration decision pursuant to section 401(b), and a number of them have granted the requested injunctions. *See Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, No. 84-1488 (8th Cir. June 7, 1984); *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 570 F. Supp. 227 (M.D. La. 1983); *Pacific Northwest Bell Telephone Co. v. Washington Utilities & Transportation Commission*, 565 F. Supp. 17 (W.D. Wash. 1983); *Chesapeake & Potomac Telephone Co. v. Public Service Commission*, 560 F. Supp. 844 (D. Md. 1983). But none of the courts granting injunctions, aside from the district court below, have directly addressed the question the Maine P.U.C. has raised here: whether the FCC's decision constitutes an "order" in the contemplation of section 401(b). We conclude that it does not, for several reasons.

First, the Administrative Procedure Act defines the word "order" as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rulemaking* . . . ." 5 U.S.C. § 551(6) (emphasis added). Although this definition applies to the APA, enacted in 1946, and not necessarily to the Communications Act, enacted in 1934, the APA was the product of extensive study of pre-existing procedure. Some of its provisions—

particularly those governing judicial review—were largely declaratory of existing law. Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 Harv. L. Rev. 1823, 1829 (1978). And, post-APA statutes and rules typically incorporate the APA's concepts and distinctions. Thus, even if pre-APA statutes used the term "order" inconsistently, procedural coherence warrants reference to the APA's definitions as a starting point and their use as a guide in determining the proper construction of pre-existing, related procedural statutes—at least where other non-APA considerations also point clearly in the same direction. *See Kroeger v. Stahl*, 148 F. Supp. 403, 406 (D.N.J.) (using APA definition of "order" in interpreting 47 U.S.C. § 401(b), *aff'd*, 248 F.2d 121 (3rd Cir. 1957).

Second, to interpret section 401(b) more broadly—to apply it beyond the context of the "adjudicatory order"—threatens to interfere seriously with the well established principle that the "enforcement" of the Communications Act is "entrusted primarily to an administrative agency." *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950); *see Lechtner v. Brownyard*, 679 F.2d 322, 327 (3rd Cir. 1982) ("The focus of the Act is the general public, with the FCC, not the private litigant, as its champion.") Section 401, in relevant part, reads as follows:

> (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.
>
> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or

> any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The first part, subsection (a), allows the *Commission* to ask a federal court to enjoin "a failure to comply with or a violation of any of the provisions" of the Act; the second part, subsection (b), allows a private person to require compliance with a Commission "order." Section 401(a) allows the Commission to decide precisely where and how to enforce the Act. Section 401(b) is consistent with the Commission's prerogatives under section 401(a) only if the term "order" is read to apply exclusively to those cases in which the Commission has previously considered and determined the specific rights and duties in question and where the private action seeks only to enforce the Commission's specific mandate. Only then would the Commission retain enforcement initiative, selecting a particular target for regulatory action and specifying the regulatory constraints that are to govern the target.

Third, to interpret "order" in section 401(b) broadly enough to encompass rules threatens the sound development of a coherent nationwide communications policy—a central objective of the 1934 Act. *See* 47 U.S.C. § 151; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *Benanti v. United States*,355 U.S. 96, 104 n.14 (1957). Rules are general in form and they can be highly general in content. *See, e.g., Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 418 (1942) ("Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making

power is addressed to and sets a standard of conduct for all to whom its terms apply."); *Precious Metals Associates, Inc. v. Commodity Futures Trading Commission*, 620 F.2d 900, 911 (1st Cir. 1980) ("Rulemaking proceedings are . . . designed to fill in the interstices of a statute.") (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) and *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973); *PBW Stock Exchange, Inc. v. SEC*, 485 F.2d 718, 732 (3rd Cir. 1973) ("Rulemaking . . . characteristically involves . . . declaring generally applicable policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before it."), *cert. denied*, 416 U.S. 969 (1974).

To apply a rule to particular cases often (though not always) requires not only adjudicatory fact finding, but also interpretation of the rule's scope and meaning. *See, e.g., Gardner v. Toilet Goods Association*, 387 U.S. 167, 193-98 (Fortas, J., dissenting) (1967); *Board of Trade v. Commodity Futures Trading Commission*, 704 F.2d 929, 932-33 (7th Cir. 1983). To construe 401(b) to include a private right to enforce commission rules would place this interpretative function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission. At best, responsibility for uniform policy would rest on the shoulders of an overworked (and inexpert) Supreme Court. The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy. And one need only look at the highly general language in which some Commission rules are stated to realize that this shift of power from Commission to courts is not merely a theoretical concern. *See, e.g.*, 47 C.F.R. § 21.3 (general principles of telecommunications licensing); 47 C.F.R. § 73.1920 (personal attack rule). There is no reason to believe that Congress intended an interpretation of 401(b) that could threaten such a shift or undermine the well established bar against private actions to enforce the Communications Act. *See, e.g., Lechtner v. Brownyard, supra; Massachusetts Universalist Convention v. Hildreth & Rogers Co., supra.*

Fourth, the Act's statutory review provisions can be read more fairly and coherently if 401(b) is construed narrowly. The normal way to obtain review of an FCC order is for a party to petition a circuit court of appeals. 47 U.S.C. § 402; *see, e.g., City of Rochester v. Bond*, 603 F.2d 927, 934-35 (D.C. Cir. 1979) (§ 402 as exclusive route to judicial review). Section 401(b) seems to foresee such review, for it discourages the district courts from reexamining the validity of the FCC "order" in question. It states that if, "after hearing, th[e] court determines that the order was regularly made and duly served," the court shall enforce obedience; this language suggests that the substantive validity of the order is not to be considered. *See Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, No. 84-1488 (8th Cir. June 7, 1984); *American Bond & Mortgage Co. v. United States*, 52 F.2d 318, 320 (7th Cir. 1931), *cert. denied*, 285 U.S. 538 (1932); *United States v. National Plastikwear Fashions, Inc.*, 123 F. Supp. 791, 793-94 (S.D.N.Y. 1954). This "split" of power between circuit and district courts (leaving 'review' to the first and 'enforcement against the disobedient' to the second) makes a degree of sense where an 'adjudicatory' order is at issue, for the 'disobedient person' in such a case was likely a party to the order and might have sought review of the agency decision in the circuit court. It makes far less sense and is far less fair in the case of an agency rule, which might well be enforced against persons not parties to the rulemaking proceeding. *Compare Yakus v. United States*, 321 U.S. 414 (1944) (administrative regulation can be enforced in proceeding which precludes review of validity of the regulation) *with Adams Wrecking Co. v. United States*, 434 U.S. 275 (1978) (suggesting troubling nature of the *Yakus* holding and its limited reach) *and id.* at 289-90 (Powell, J., concurring) (same). The anomaly of such a restriction on proceedings to enforce rules would have been perceived still more forcefully in 1934, when 'pre-enforcement' review of rules was virtually non-existent—when the validity of a rule was typically first considered at the time of enforcement. *See, e.g., Federal Power Commission v. Metropolitan*

Edison Co., 304 U.S. 375, 383-85 (1938); Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185, 196-97 & n.55, 202-03 (1974). *Cf. Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70-71 & n. 20 (1970). And this fact makes it rather unlikely that Congress believed section 401(b) would apply to Commission rules.

Fifth, other sections of the Communications Act use the word "order" in a way that seems to envision Commission decisions requiring specific actions of specific carriers. *See, e.g.*, 47 U.S.C. §§ 201 (orders directing carriers to establish through services); 204 (orders concerning collection and refund of proposed increased rates); 205 (order directing carrier to cease and desist from charging unreasonable rates); 209 (order directing carrier to pay damages for violation of Act); 214(d) (order directing carrier to expand its facilities). With one exception, to which we shall turn shortly, we are unaware of any provision that uses the word "order" to refer to FCC interpretations of the Act or to FCC rules of general applicability. Indeed, section 416 of the Act, 47 U.S.C. §416(a), provides that "[e]very order of the Commisssion shall be forthwith served upon the designated agent of the carrier . . . ." This language suggests that Congress assumed that "orders" took the form of specific directives to specific parties.

Sixth, to allow communications common carriers to enforce generalized FCC policy against state commissions through 'enforcement' suits in federal district courts threatens issue splitting and procedural complexity. New England Telephone, for example, might readily have raised the 'depreciation' problem in the Maine Supreme Judicial Court, where it obtained review of the rest of the P.U.C.'s rate decision in which the depreciation issue was embedded. Instead, it expressly withheld the issue from that proceeding, bringinng it before the federal district court instead, thereby leaving the state court in the difficult position of trying to judge the reasonableness of certain of the

P.U.C.'s determinations—the selection of a rate of return fairly reflecting the risks to investors, for example—without considering the closely inter-related depreciation issue. The Maine courts were to review Hamlet without the Prince; the federal courts, the Prince without the rest of the play. Since the supremacy clause of the federal Constitution requires the Maine courts to apply federal commuunications law where appropriate, we see no reason to read the statute to encourage this form of fractionated review.

III

Before concluding, we consider three arguments in New England Telephone's favor:

First, in *Columbia Broadcasting System v. United States*, *supra*, the Supreme Court interpreted the word "order" in 401's neighboring section, section 402, to encompass agency rules promulgated after rule-making proceedings. Thus, our interpretation requires reading the same word differently in the two sections. While we recognize the force of the argument calling for a similar construction, *see, e.g., Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *Firestone v. Howerton*, 671 F.2d 317, 320 & n.6 (9th Cir. 1982), we find sufficient difference in the functions of the two sections to justify assigning a different scope to the same word in the two settings. *See, e.g., United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1184-85 (6th Cir. 1982), *aff'd*, 104 S.Ct. 575 (1984); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 461 n. 230 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

Section 402(a), which the *CBS* Court considered, concerns judicial review of FCC decisions. It states

> Any proceeding to enjoin, set aside, annul, or suspend any *order* of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

47 U.S.C. § 402(a) (emphasis added); *see* 28 U.S.C. § 2342 ("The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final *orders* of the Federal Communications Commission made reviewable by section 402(a) of title 47 . . . .") (emphasis added). *CBS* concerned the FCC's Chain Broadcasting Regulations, which told broadcasting stations in part how they were to deal with the networks. CBS argued that the Court should review the regulations' lawfulness, despite the absence of any enforcement order based on the regulations. If it had to wait until the regulations were enforced to secure judicial review of their validity, it might have to wait forever, CBS said, for the stations intended to obey the regulations, to CBS's detriment. Thus, to interpret "order" in section 402 to apply only to the outcome of an adjudicatory enforcement proceeding would deprive those who might be seriously injured by others' obedience to an FCC rule of any opportunity to challenge the rule's legal validity. The Court agreed. And it considered the regulations to have sufficiently serious and immediate impact to warrant pre-enforcement review of their lawfulness. Accordingly, rules were swept within the scope of section 402's reference to "any order."

As this statement of the issues in *CBS* reveals, the policy concerns relevant to a proper interpretation of the word "order" in section 402 involve fundamental principles of judicial review and fair treatment. These concerns point towards a broad interpretation of the word in section 402, but no such considerations are at issue in the case of section 401. To the contrary, private parties have no inherent right to enforce FCC rules, and, as we have remarked above, considerations of fairness favor, if anything, a narrow construction of section 401's reference to "any order." In the absence of some strong policy reason favoring a broad interpretation of "order" in section 401, the various considerations previously discussed seem sufficient to outweigh the importance of linguistic uniformity among *different sections* of the statute.

Second, New England Telephone denies that the FCC decision here at issue was embodied in a "rule;" rather, it contends we should consider it as an adjudicatory order. The decision was called a "Memorandum Opinion and *Order*" (emphasis added); and it was issued as a "declaratory order" pursuant to 47 C.F.R. § 1.2 (authorizing the Commission) to issue declaratory rulings, in accordance with section 5(e) of the APA, 5 U.S.C. § 554(e)). As the Supreme Court has said, however, "[t]he particular label placed upon [a decision] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. at 416. The FCC commonly adopts rules in opinions called "orders." *See, e.g.*, 47 C.F.R. § 1.429(i); *Columbia Broadcasting System, Inc. v. United States*,316 U.S. at 425. And, in this instance, the proceedings that led to the decision were "properly treated by the FCC as rule making proceedings under 47 C.F.R. §§ 1.399 - 1.429." 570 F. Supp. at 1571. The FCC has confirmed that the decision "was adopted as part of a rulemaking docket." Memorandum of Federal Communications Commission as Amicus Curiae at 16. There is no indication that anyone followed adjudicatory, rather than rulemaking, procedures.

The temptation to refer to the FCC's deliberations as an "adjudicatory proceeding" that led to a "declaratory order" arises from the FCC's consolidation of the pure *Part 31* rulemaking proceeding with GTE of Ohio's declaratory action against the Ohio Public Utilities Commission. The latter action—entitled "Petition for Declaratory Ruling"—might perhaps be regarded as adjudicatory, despite its consolidation into a rulemaking proceeding. But even if its culminating order was regarded as enforceable under 401(b), it would be enforceable against the Ohio P.U.C., not the Maine P.U.C., which was not a party to the declaratory action. (Nor for that matter was the Maine Commission a party to the Part 31 proceeding with which the Ohio proceeding was consolidated.)

Third, New England Telephone points to the importance of the policy that the FCC is trying to vindicate with its effort to enforce uniform national depreciation rules. The threat of uneconomic bypass of the existing telephone system is arguably serious and may well justify regulatory decision-making by a single national authority. Moreover, New England Telephone suggests that the FCC's authority to impose preemptive nationwide rules is obvious. *See, e.g., Computer & Communications Industry Association v. FCC*, 693 F.2d 198, 214-18 (D.C. Cir. 1982), *cert. denied*, ____ U.S. ____ (1983); *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). Thus, it believes the Maine commission is acting contrary to clear law. Assuming, for the sake of argument, that all this is true, however, why must section 401(b) offer the only remedy? The federal courts are currently considering the substantive arguments concerning the FCC'-s authority. *Virginia State Corporation Commission v. FCC, supra.* Is it not reasonable to assume that the Maine commission and the Maine courts will read the decision? And, in the meanwhile, does New England Telephone not have a remedy sufficient to ameliorate any serious threat to the national telephone network through section 401(a); can it not ask the Commission to bring an enforcement action if the threat is truly serious? Finally, why can it not obtain an adjudication from the FCC against the Maine commission, through the same declaratory ruling procedure employed by GTE of Ohio, and *then* enforce the resultant order under 401(b) if necessary? Of course, in the process, the FCC likely will have to decide how important it is to vindicate New England Telephone's position. But this agency check permits assurance that New England Telephone's claim of public importance is correct, a determination that is properly left in the first instance to the FCC.

In sum, we conclude that New England Telephone cannot bring this case in federal court under the authority of section 401(b).

The injunction is vacated and the case is remanded to the district court with instructions to dismiss the action.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§1331 Federal question

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

United States Code, Title 28:

§1337(a) Commerce and antitrust regulations; amount in controversy, costs

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

United States Code, Title 28:

§2342(1) Jurisdiction of court of appeals

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

United States Code, Title 47:

§152(b)

Except as provided in section 224 of this title and subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign **communication solely through physical connection** with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or (3) of this subsection would be applicable except for furnrishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

United States Code, Title 47:

§220(b) Accounts, records, and memoranda; depreciation charges; forfeitures and penalties

The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not,

after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under it operating or other expenses.

United States Code, Title 47:

§220(h)

The Commission may classify carriers subject to this chapter and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carrieres are subject to State commission regulation with respect to matters to which this section relates.

United States Code, Title 47:

§220(j)

The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

United States Code, Title 47:

§221(b)

Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

United States Code, Title 47:

§402(a) Judicial review of Commission's orders and decisions Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

United States Code, Title 47:

§401(b) Enforcement of chapter and orders of Commission; jurisdiction

If any person fails or neglect to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

§151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to [make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges] for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter. June 19, 1934, c. 652, Title I, § 1, 48 Stat. 1064; May 20, 1937, c. 229, § 1, 50 Stat. 189.

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No. 84-483

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS PUBLIC SERVICE COMMISSION; ROBERT E. JOHNSTON, COMMISSIONER; PATRICIA A. QUALLS, COMMISSIONER; and JAMES W. DANIEL, COMMISSIONER,
Petitioners

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

The only question properly presented for review in the event a writ of certiorari is granted is:

1. Whether the Court of Appeals for the Eighth Circuit correctly held that the district court's denial of an injunction constituted an abuse of discretion under the circumstances of this case.

Respondent Southwestern Bell Telephone Company does not agree that the questions presented by Petitioner for review are proper in light of the Eighth Circuit's holding in this case.

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No. 84-483

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ARKANSAS PUBLIC SERVICE COMMISSION; ROBERT E. JOHNSTON, COMMISSIONER; PATRICIA A. QUALLS, COMMISSIONER; and JAMES W. DANIEL, COMMISSIONER,

Petitioners

VS.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S STATEMENT OF THE CASE

This case involves the federal court enforcement of two orders of the Federal Communications Commission (F.C.C.).

On March 9, 1984, Respondent, Southwestern Bell Telephone Company, filed suit in district court against Petitioner, Arkansas Public Service Commission. Southwestern Bell requested a preliminary and permanent injunction requiring Petitioner to use, in setting rates for intrastate services, the depreciation methods and rates prescribed by the F.C.C. for property jointly used in intrastate and interstate telecommunications. The district court denied enforcement of the F.C.C.'s orders, finding the F.C.C.'s preemption of intrastate depreciation methods to be ultra vires. *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission,* 584 F. Supp. 1087 (E.D. Ark. 1984); Petitioner's App. A-34. The judgment of the

district court was appealed to the Court of Appeals for the Eighth Circuit, which reversed and entered the order Petitioner has requested this Court to review. *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission,* 738 F.2d 901 (8th Cir. 1984); Petitioner's App. A-43.

Southwestern Bell's facilities are jointly used in providing interstate telecommunications regulated by the F.C.C. and intrastate telecommunications regulated by the Petitioner Arkansas Public Service Commission. The F.C.C. has excusive jurisdiction under 47 U.S.C. §410 to separate the costs of various types of facilities between the interstate and intrastate jurisdictions. The same facilities are used for both interstate and intrastate telecommunications; the separation of costs for ratemaking purposes occurs only on Southwestern Bell's books and records.

The F.C.C. also has authority to prescribe the depreciation rates for the various types of facilities under 47 U.S.C. §220. In 1980, the F.C.C. determined that the depreciation methods and rates previously prescribed for telephone companies under 47 U.S.C. §220 were inadequate and ordered that two depreciation methods called Equal Life Group ("ELG") and Remaining Life ("RL") be used thereafter. *Report and Order,* 83 F.C.C.2d 267 (1980), *affirmed and clarified on reconsideration,* 87 F.C.C.2d 916 (1981). The F.C.C. subsequently determined that state commissions were not preempted from using inconsistent depreciation rates and methods for intrastate ratemaking, *Amendment of Part 31,* 89 F.C.C.2d 1094 (1982), but on reconsideration determined in a "Preemption Order" that it could and should exercise its preemptive powers. *Amendment of Part 31,* 92 F.C.C.2d 864 (1983); Petitioner's App. A-1. In that order, the F.C.C. preempted and declared to be void inconsistent depreciation rates and methods prescribed by state commissions. 92 F.C.C.2d at 879. The F.C.C.'s Preemption Order was appealed and upheld on June 18, 1984 in *Virginia State Corporation Commission v. F.C.C.,* 737 F.2d 388 (4th Cir. 1984). A petition for rehearing en banc was denied on October 3, 1984.

Prior to the present controversy, the Arkansas Commission routinely adopted the depreciation rates prescribed by the F.C.C. when the Arkansas Commission set Southwestern Bell's rates for intrastate services. For over thirty years, three-way meetings between representatives of the F.C.C., the Arkansas Commission and Southwestern Bell have been held at three year intervals to determine the appropriate depreciation methods and rates for Southwestern Bell's property. Participation by the Arkansas Commission is provided for pursuant to 47 U.S.C. §220(j). After the three-way meeting in June, 1983, the F.C.C., in an interim Represcription Order, prescribed depreciation rates for Southwestern Bell that were based on ELG and RL methods of calculation and which were consistent with the Preemption Order. The F.C.C. adopted the interim order, which became final on December 20, 1983. *In the Matter of the Prescription of Revised Percentages of Depreciation,* 96 F.C.C.2d 257 (1983).

While the three-way represcription process was underway, Southwestern Bell filed an application with the Arkansas Commission on March 23, 1983, for an increase in rates for intrastate services. A portion of the requested increase was to recover the expected increased depreciation expenses resulting from the rates prescribed by the F.C.C. in the Represcription Order. In an Order of January 23, 1984, the Arkansas Commission discussed the Preemption and Represcription Orders but rejected the use of ELG and postponed the use of RL methods of depreciation for intrastate ratemaking purposes, stating:

> We believe that we have not lawfully been preempted by the F.C.C., therefore, we are not bound to adopt the depreciation methods prescribed by the F.C.C., but rather are free to adopt whatever depreciation methods we feel reasonable and justified.

Re Southwestern Bell Telephone Co., 58 PUR 4th 82, 94 (Ark. PSC 1984).

The Petitioner and Respondent stipulated that if the Arkansas Commission had adopted the depreciation rates and methods prescribed by the F.C.C., Southwestern Bell's intrastate revenue requirement to be recovered through intrastate rates would have increased by $11,256,223 annually. Southwestern Bell sought and obtained an injunction allowing it to collect this amount of revenue through higher rates for intrastate services, subject to refund if the Preemption Order is ultimately overturned on appeal. (Respondent's Appendix A-1).

The Preemption Order established the depreciation methods, and the Represcription Order established the depreciation rates for Southwestern Bell's property in Arkansas. Southwestern Bell sought enforcement of both the Represcription Order and the Preemption Order. The Eighth Circuit's decision enforces both the Preemption and Represcription Orders and requires that a challenge to an F.C.C. order be brought in accordance with the statutory review procedures.

SUMMARY OF REASONS FOR DENYING THE WRIT

The decision of the Eighth Circuit faithfully follows all prior decisions of this Court relevant to this case, including the recent controlling case of *F.C.C. v. ITT World Communications, Inc.*, ____ U.S. ____, 104 S.Ct. 1936, 80 L.Ed.2d 480 (1984).

Second, under federal statutes governing review of F.C.C. orders, this is not a proper case in which to review the validity of the Preemption Order.

Third, the case of *Virginia State Corporation Commission v. F.C.C.*, 737 F.2d 388 (4th Cir. 1984), upholding the Preemption Order disposes of all questions regarding the patently invalid or ultra vires nature of the Preemption Order.

Fourth, the decision of the Eighth Circuit does not conflict with that of the First Circuit in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine,* 742

F.2d 1 (1st Cir. 1984). The issue of whether the Prescription Order was enforceable under 47 U.S.C. §401(b) decided by the First Circuit was not raised in the courts below in this case.

Finally, the Arkansas Commission does not have a legally cognizable interest and has no standing to obtain judicial review of the Eight Circuit's decision.

REASONS FOR DENYING THE WRIT

A. The decision of the Eighth Circuit does not conflict with this Court's decisions in *Leedom v. Kyne, Hecht v. Bowles* or *Federal Maritime Commission v. Seatrain Lines, Inc.*

The Arkansas Commission alleges that the decision of the Eighth Circuit conflicts with three deicisions of this court. The Arkansas Commission first cites *Leedom v. Kyne,* 358 U.S. 184 (1958), for the proposition that a district court may refuse to enforce an administrative order. The language cited from that case by the Arkansas Commission (Petition, p. 11) refutes the Commission's own arguments. The action in *Leedom* was "one to strike down an order of the [NLRB] made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U.S. at 188. This principle has become known as the "patent violation doctrine". The doctrine is properly applied in the case of an order that is not otherwise subject to judicial review. Such was the order in *Leedom.* This Court observed:

> Here, . . ."absence of jurisdiction of the federal courts" would mean "a sacrifice or obliteration of a right which Congress" has given professional employees, for there is no other means within their control . . . to protect and enforce that right.

358 U.S. at 190.

In the present case, the Arkansas Commission had available, and participated in, the statutory judicial review process to challenge the Preemption Order in the Fourth Circuit.

Moreover, the *Leedom* doctrine only applies to a *patent* violation of agency authority. Manifestly, if the violation complained of were patent the Fourth Circuit would not have upheld the Preemption Order. Even without the benefit of that decision, the Eighth Circuit properly found that it could not "conclude that the Preemption Order constitutes a patent violation of the F.C.C.'s authority." 738 F.2d at 906, n. 10; Petitioner's App. at A-49.

The extensive quotations on pages 7-10 of the Petition, ending with the quotation from *Hecht v. Bowles,* 321 U.S. 321 (1944), establish a proposition that was followed by the Eighth Circuit. That proposition is that the district court must exercise its equitable powers to fashion equitable relief to fit the circumstances of the case at hand whenever it is called upon to enforce an administrative agency's order by injunction. The Eighth Circuit faithfully applied this principle, stating:

> Once the four elements of section 401(b) are satisfied, the statute directs that "the court *shall* enforce obedience to such order by a writ of injunction or other proper process. . . ." (emphasis supplied). We do not read "shall" as withholding all discretion from the district court with respect to issuance of the injunction. *Hecht Co. v. Bowles,* 321 U.S. 321, 64 S. Ct. 587, 88 L.Ed. 754 (1944). Under the circumstances of this case, however, we conclude that denial of relief would be an abuse of discretion.

738 F.2d at 908; Petitioner's App. at A-54.

There were sound reasons for the Court's discretionary denial of an injunction in *Hecht* which are not present in this case. Contrast the "studied consideration of its defiance" by the Arkansas Commission, 738 F.2d at 908, Petitioner's App. at A-54, with the strenuous efforts to comply made by the defendant in *Hecht v. Bowles,* 321 U.S. at 325-26. The remedy in the case at hand was tailored to the circumstances of the case, even going so far as to require refunds of the increased rates if the Preemption Order is ultimately overturned.

Finally, the Arkansas Commission seriously misstates the holding of this Court in *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 36 L.Ed.2d 620, 93 S.Ct. 1773 (1973). Petition, p. 10. That case involved judicial review of an administrative order by direct appeal to a court of appeals. The language quoted by the Arkansas Commission pertains to the scope of the reviewing court's consideration pursuant to the statute governing such review. The actual principle quoted has no relevance in this case because the district court has no role in the statutory procedure governing judicial review of F.C.C. orders as that review is set out by statute. 47 U.S.C. §402 (a), 28 U.S.C. § 2342 (1).

b. The decision of the Eighth Circuit does not involve an important question of federal law which has not been but should be settled by this court.

Recently, this Court decided the question of the district court's authority to invalidate an agency order alleged to be ultra vires, in *F.C.C. v. ITT World Communications, Inc.*, ____ U.S. ____, 104 S.Ct. 1936, 80 L.Ed.2d 480 (1984):

> We consider initially the jurisdiction of the District Court to enjoin F.C.C. action as ultra vires. Exclusive jurisdiction for review of final F.C.C. orders, such as the F.C.C.'s denial of respondent's rulemaking petition, lies in the Court of Appeals. 28 U.S.C. §2342 (1); 47 U.S.C. §402(a). Litigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency's order. [Citations omitted.] Yet that is what respondents have sought to do in this case. In substance, the complaint filed in the District Court raised the same issues and sought to enforce the same restrictions upon agency conduct as did the petition for rulemaking that was denied by the F.C.C. .... The appropriate procedure for obtaining judicial review of these issues was appeal to the Court of Appeals as provided by statute.

> The Administrative Procedure Act authorizes an action for review of final agency action in the District Court to the extent that other statutory procedures for review are inadequate. . . . We conclude that the District Court lacked jurisdiction over respondent's ultra vires claim.

80 L.Ed.2d at 487.

As the Eighth Circuit held, the Arkansas Commission's argument that *ITT* does not control the disposition of this case is "without merit." 738 F.2d at 906; Petitioner's App. at A-49.

The holding of *ITT* is also consistent with the holding of *Leedom,* which allowed the district court to act because other statutory procedures for review were inadequate. That is not the case here, and the Arkansas Commission has availed itself of those other procedures by appealing the Preemption Order to the Fourth Circuit. Under *ITT* an ultra vires agency act which justifies district court interference is one which is patently improper and for which no other review is available.

The remainder of the argument in this subsection of the Petition relates solely to the question of the validity of the Preemption Order, a question within the exclusive jurisdiction of the Fourth Circuit. In response to statements that Southwestern Bell is no longer an interstate carrier and no longer subject to the jurisdiction of the F.C.C. because of the Bell System divestiture, it is clear that the F.C.C. continues to exercise its statutory authority over Southwestern Bell and the other former Bell operating companies. Southwestern Bell has tariffs on file with the F.C.C. at the present time. A spate of orders have been issued by the F.C.C. in 1984 addressed to Southwestern Bell and affecting various aspects of its operations.[1] See also *Illinois Bell*

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[1] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by The Bell Operating Companies, CC Docket No. 83-115, Memorandum Opinion and Order on Reconsideration, adopted 6/1/84, released 6/1/84, 49 Fed. Reg. 26,056 (1984).

Telephone Co. v. F.C.C., 740 F.2d 465, 471 (7th Cir. 1984), acknowledging that the Bell companies "continue to be regulated both by state regulatory commissions and by the F.C.C."

Moreover, similar erroneous claims were rejected in *North Carolina Utilities Commission v. F.C.C.*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) and *North Carolina Utilities Commission v. F.C.C.*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 424 U.S. 874 (1977). Divestiture does not alter the fact that the same "interconnection" argument now advanced by the Arkansas Commission against the Preemption Order has been rejected by the F.C.C. and the courts repeatedly. The Fourth Circuit has observed:

> [T]he [F.C.C.'s] declaratory statement of its primary authority over the interconnection of terminal equipment with the national telephone network is a proper and reasonable assertion of jurisdiction conferred by the Act. *Cf. GTE Serv. Corp. v. F.C.C.*, 2d Cir. 1973, 474 F.2d 724, approving an F.C.C. ruling that prohibited telephone companies, including those that engaged primarily in local exchange service and participated in interstate service only through connection with other unrelated carriers, from engaging in the data processing business.

537 F.2d at 794.

Jurisdictional Separations Procedures; Amendment of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Decision and Order, adopted 12/1/83, released 2/15/84, 49 Fed. Reg. 7934 (1984).

Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, adopted 4/27/84, released 4/27/84, 49 Fed. Reg. 19,821 (1984); Memorandum Opinion and Order, adopted 5/24/84, released 5/25/84, 49 Fed. Reg. 23,921 (1984).

Investigation of Access and Divestiture Related Tariffs and MTS and WATS Market Structure, CC Docket Nos. 83-1145, Phase I and 78-72, Phase I, Memorandum Opinion and Order, adopted 5/10/84, released 5/15/84, 49 Fed. Reg. 23,924 (1984).

c. **This case does not present a conflict in opinions rendered in the First and Eighth Circuits.**

The petition for a writ of certiorari is the first instance in which the Arkansas Commission has asserted that the F.C.C.'s Preemption Order is not an "order" within the meaning of 47 U.S.C. §401(b) and therefore not enforceable by Southwestern Bell under that statute. Where issues are neither raised in nor considered by the court below, this court ordinarily will not consider those issues. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2, (1970); *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 79 L.Ed.2d 775, 783, n.6, 104 S.Ct. 1464 (1984). The gravamen of the Arkansas Commission's argument in this action has always been the unlawfulness of the F.C.C.'s Preemption Order. See *Re Southwestern Bell Telephone Co.*, 58 P.U.R. 4th 82, 93-94 (1984); 738 F.2d at 905, Petitioner's App. at A-48; 738 F.2d at 906-07, Petitioner's App. at A-49-51; 738 F.2d at 907, Petitioner's App. at A-52.

The Arkansas Commission did not raise below this argument upon which the First Circuit based its decision in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1 (1st Cir. 1984); Petitioner's App. A-56. Nevertheless, it invites this Court to resolve the alleged conflict between the First and Eighth Circuit decisions and approve that of the First Circuit. The practical result of the Arkansas Commission's request would be to allow it to assert a position in this Court contrary to that taken in the courts below. In the district court the parties stipulated that the F.C.C. Preemption Order was an *order* that was regularly made and duly served. 738 F.2d at 908, Petitioner's App. at A-53. The Arkansas Commission now asserts a position inconsistent with that taken below.

The First Circuit noted that at the time of its decision none of the courts granting injunctions to telephone companies under §401(b) had considered the question of whether the F.C.C. Preemption Order was an order enforceable under that statute. 742 F.2d at 4; Petitioner's App. at A-61. The Fifth Circuit

subsequently held it was an enforceable order and specifically rejected the holding of the First Circuit relied upon by the Arkansas Commission. *South Central Bell Telephone Co. v. Louisiana Public Service Commission,* No. 83-3494 (5th Cir. Oct. 11, 1984), Respondent's App. A-18. After an in-depth analysis of the First Circuit's reasoning the Fifth Circuit held "that the Preemption Order is an order within the meaning of §401(b)." Respondent's App. at A-23.[2]

"Certiorari is granted only...in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *NLRB v. Pittsburg Steamship Co.,* 340 U.S. 498, 502 (1951). The type of conflict giving rise to certiorari is not present in this case, and certiorari should be denied. The split of authority on this issue is between the First and the Fifth Circuits, which have considered the issue, not the Eighth Circuit or numerous district courts which have not addressed this point and whose decisions therefore cannot provide reasons to support the issue on either side. The Arkansas Commission's petition for certiorari based on conflict of circuit court opinions should therefore be denied.

The Arkansas Commission, in order to obtain this Court's review of the decision of the Eighth Circuit, must show that it has standing to obtain review. The right to review of a judgment exists only in one who is prejudiced by the judgment. "It is axiomatic that the federal courts do not decide abstract questions posed by parties who lack a stake in the outcome of the controversy." *Socialist Labor Party v. Gilligan,* 406 U.S. 583, 586 (1972). Thus, the aggrieved party must have an interest recognized by law and must be injured by the judgment. The Arkansas Commission has not been prejudiced by the judgment below. No party disputes that the F.C.C. Orders violated by the Arkansas Commission are in force.

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[2] Another recent case concerning the F.C.C.'s Preemption Order, *Cincinnati Bell Telephone Co. v. Public Utilities Commission of Ohio,* No. 84-623, does not involve enforcement under § 401(b).

The Arkansas Commission complains that, if the First Circuit reasoning is correct, Southwestern Bell could not seek an injunction against the Arkansas Commission's willful and public flouting of federal law. Even if the Arkansas Commission were successful upon review by this Court it could not benefit thereby. Unless the Arkansas Commission again defies the law, no benefit could accrue to it from removal of the lower Court's injunction. Even if renewed defiance is the Arkansas Commission's goal, continued frustration of this intent is hardly an "injury" sufficient to invoke the discretionary powers of this Court.

CONCLUSION

For all of the reasons set forth above, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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** Southwestern Bell Telephone Company is a wholly owned subsidiary of Southwestern Bell Corporation. Other subsidiaries of the parent Corporation are Southwestern Bell Publications, Inc., Southwestern Bell Mobile Systems, Inc., and Southwestern Bell Telecommunications, Inc.

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LR-C-84-247

Southwestern Bell
Telephone Company
Petitioner

vs.

Arkansas Public Service
Commission; Robert E.
Johnston, Commissioner;
Patricia S. Qualls,
Commissioner; and
James W. Daniel,
Commissioner
Respondents

INJUNCTION

Pursuant to the Opinion of the Court of Appeals of June 7, 1984 reversing this Court's Order of March 30, 1984, the instructions contained in the opinion of the Court of appeals and the stipulations of the parties, the Arkansas Public Service Commission is hereby ordered and enjoined to take the following action:

1. The Commission is ordered to approve an increase in Southwestern Bell Telephone Company's rates for intrastate services totaling $11,256,223 annually. (Opinion of Court of Appeals, p. 11, n. 15). Southwestern Bell shall immediately submit to the Commission tariffs reflecting said increase. The Commission is ordered to conduct a hearing no later than July 27, 1984 for the purpose of determining the allocation of the higher rates over the Company's various services, and to issue

an order pursuant thereto no later than August 3, 1984. The increased rates shall become effective no later than the date on which the Company files tariffs in compliance with the Commissions's order.

2. The Commission is ordered to approve a surcharge pursuant to Ark. Stat. Ann. § 73-217(c)(ii) (Supp.1983). Said surcharge shall be for a total amount equal to the amount Southwestern Bell would have collected if the Commission had included the $11,256,233 in the rate increase granted on January 23, 1984, beginning on January 30, 1984 (the date other tariffs resulting from the order of January 23, 1984, were approved) and ending on the date the increased rates ordered herein are effective. Said surcharge shall also include an amount for interest at an annual rate of 10% to compensate Southwestern Bell for the delay in receipt of the increased rates.

3. Southwestern Bell shall collect the increased rates ordered in paragraph 1 and the surcharge ordered in paragraph 2 subject to refund in the event the FCC's Preemption Order is ultimately held to be invalid by either the Court of Appeals for the Fourth Circuit or the United States Supreme Court. This injunction shall remain in effect until developments in that case warrant further action by this Court.

IT IS SO ORDERED.

/s/ William R. Overton
United States District Judge

Dated July 13, 1984

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-3494

South Central Bell Telephone Company,
Plaintiff-Appellee,

v.

Lousiana Public Service Commission,
Thomas E. Powell, George J. Ackel,
Ed Kennon, Louis Lambert and John G.
Schwegmann, Jr.,
Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Louisiana

(October 11, 1984)

Before GEE, RANDALL and JOHNSON, Circuit Judges.

RANDALL, Circuit Judge:

The Louisiana Public Service Commission appeals a modified preliminary injunction of the District Court for the Middle District of Louisiana requiring the Louisiana Public Service Commission to grant an increase in intrastate telephone rates sufficient to allow the South Central Bell Telephone Company to cover increased operating expenses of $40,506,000 resulting from the implementation of depreciation rates and methodologies prescribed by the Federal Communications Commission. The district court issued its order upon finding

that the Louisiana Public Service Commission had failed to comply with an earlier, non-dollar specific preliminary injunction requiring the Louisiana Public Service Commission to utilize the federally mandated depreciation practices. Because we conclude that the district court acted within its authority and discretion in issuing the modified injunction, we affirm.

I. BACKGROUND.

A. Basic Principles of Public Utility Ratemaking.

Because this case involves the role of depreciation rates and methodologies in determining the revenue requirements of a regulated utility, we begin by briefly reviewing certain basic principles of regulatory ratemaking.[1] Public regulatory commissions have the responsibility of ensuring that regulated utilities on the one hand do not receive monopolistic returns but on the other hand do recover sufficient revenues to pay legitimate expenses and to provide a rate of return on investment that will compensate present investors and attract new capital when needed. In determining a rate structure that will adequately meet a utility's prospective revenue requirements, a regulatory commission makes predictions based on the utility's revenues, expenses, and investments in some selected previous year, called the "test year." Although the normal costs of service incurred by a utility will usually increase from year to year, the test year serves as a reasonably accurate basis for estimating future operating expenses and return requirements because the increasing costs generally will be offset, at least theoretically, by additional revenue supplied by new customers. Once the cost of

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[1] For a more comprehensive discussion of agency ratemaking and associated problems, see generally J. Bonbright, Principles of Public Utility Rates (1961); Foster, *Fair Return Criteria and Estimation,* 28 Baylor L. Rev. 883 (1976); Schwartz, *Inflation and Utility Rate Regulation,* 4 Utah L. Rev. 89 (1982). For a description of ratemaking in Louisiana, see *South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n,* 373 So.2d 478 (La. 1979); Defendant's Exhibit 1, at 1-9.

service for the test year is adjusted for any extraordinary change expected to occur in the upcoming year, the regulatory commission is able to calculate tariffs relying on test year figures as representative of future revenue requirements.

A utility's "rate base" is the total amount of its investments in providing its service, including its investment in working capital for the test year. The utility's earnings, or the amount returned on investment, is its revenues minus its expenses. The utility's rate of return is therefore determined by dividing the utility's total investment by its earnings. Thus, an increase in a utility's expenses requires a corresponding increase in a utility's revenues in order for the rate of return to remain constant. Similarly, an adjustment in the utility's rate of return necessitates a corresponding adjustment in the utility's revenues, assuming expenses and investment remain the same.

In determining the expenses incurred by a utility in the test year, regulatory agencies use principles of depreciation accounting. Under these principles the cost of an asset having a useful life of more than one year is not counted as an expense in the year incurred. Rather, the costs are capitalized and spread over that period of time during which the item is in service. The costs of the asset are then recouped from future ratepayers through depreciation charges. A change in the depreciation rate, therefore, results in a change in the expenses incurred during the first years of the asset's useful life, although of course, as long as the prediction of useful life is accurate, the total amount of expenses incurred over the asset's useful life would remain the same. The purpose of depreciation accounting is to match costs with the revenues they generate. Expenditures for long-lived assets are thought to be more properly charged over the various periods in which the assets are useful in the production of revenues. *See generally* Docket No. 20,188, 83 F.C.C.2d 267, 270-71 (1980).

B. FCC Regulations on Depreciation.

Regulatory power over the telecommunications industry is exercised by both federal and state governments. In 1934, Congress enacted the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, "to make available, so far as possible . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. To achieve this goal, Congress gave the Federal Communications Commission (FCC) regulatory authority to establish depreciation practices and to require the keeping of prescribed accounts.[2] The FCC's power, however, was carefully curtailed not to extend to intrastate communications.[3] Under the Communications Act, state regulatory com-

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[2] 47 U.S.C. § 220(a)-(b). Section 220(b) provides:

> (b) The Commission shall, as soon as practicable prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem prooper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

[3] Several provisions of the Act preclude the FCC from exercising jurisdiction over intrastate communications. Section 152(b) provides that "nothing in this chapter shall be construed . . . to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication." *See also* 47 U.S.C. § 221(b).

missions, such as the Louisiana Public Service Commission, retain the authority to regulate intrastate rates, facilities, and practices of the telecommunications industry. *See* La. Const. art. IV, § 21; La. Rev. Stat. Ann. § 45:1161, *et seq.*

In 1980, after seven years of study, the FCC adopted the "remaining-life" and "straight-line equal life group" (SLELG) depreciation methods. Docket No. 20,188, 83 F.C.C.2d 267 (1980), *on reconsideration,* 87 F.C.C.2d 916 (1981). According to the FCC, use of these depreciation methods would "calibrate more closely the flow of revenues with the recovery of capital," 83 F.C.C.2d at 281, and thus provide communications utilities with additional cash flow needed to meet the construction requirements of a rapidly changing technology.[4] The FCC acknowledged that use of the accelerated depreciation methods would result in increased revenue requirements over the short term, but stated that "the relative size of the increment will be repaid many times over in future years as the ability of regulated

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[4] The "remaining-life" method of depreciation replaced the "whole-life" method. Although both are used in connection with straight-line depreciation, remaining life more accurately reflects the current experienced life of an asset. The FCC explained:

> The essential difference between whole-life and remaining-life depreciation rate calculations is that the former attempts to determine that annual charge that would be appropriate in the event that the current predictions of whole-life (estimated future life added to current experienced or expired life) were in fact correct. The remaining-life process proceeds on the premise that the current prediction of remaining or prospective life is correct and attempts to allocate any unrecovered or unallocated costs over that time period. That is, the original cost less accumulated reserve, or net unrecovered cost is divided by the prospective remaining-life in order to determine the annual future charges to expense.

83 F.C.C.2d at 289. The SLELG procedure replaced the straightline vintage group (SLVG) method. The essential difference between these two is that SLELG breaks equipment down into smaller subgroups in calculating useful life. Under SLELG, therefore, estimates of useful life are in the aggregate more accurate.

telephone companies to provide '. . . rapid, efficient . . . communication service with adequate facilities at reasonable charges is enhanced.' "[5] *Id.* For similar reasons, the FCC in 1981 ruled that station connections were to be expensed immediately instead of capitalized and recovered over their useful life through depreciation. Docket No. 79-105, 85 F.C.C.2d 818 (1981).

In April 1982, the FCC, in response to a petition for clarification submitted by the National Association of Regulatory Utility commissioners (NARUC), declared that its prior rulings on depreciation methodologies and station connections were not applicable to the states. 89 F.C.C.2d 1094 (1982). Refusing to repudiate forty years of administrative practice and court prece-

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[5] The FCC further stated:

> All accounting measures are important, but in the case of capital intensive industries the measure of depreciation becomes even more important. On the whole such industries are frequently regulated and annual revenue requirements reflect both the current measure of the consumption of capital (depreciation) and a provision for the costs (return requirement) of the capital still unrecovered through depreciation charges. If depreciation policies or practices were to be determined solely with concern for the level of revenue requirements, the actual measure of depreciation might be misstated. Such distortion of the measure of depreciaiton would in turn lead to a misstatement of the results of operations for the period and would also misstate the relative position of the enterprise as shown by its balance sheet. If such distortions were perceived by present and potential investors and were deemed to be deleterious to the safety and recovery of their investment, they in turn would likely demand a higher return on their funds. Consequently, a failure to properly measure by understating these costs would, in the long run, probably be offset by higher costs of capital without any real avoidance of the ultimate need to provide full recovery for the capital.

83 F.C.C.2d at 271-72.

dent, the FCC ruled that, "when state regulation is reconcilable with federal policies or rules, there is no occasion for us to override state agency actions in furtherance of legitimate state regulatory objectives."[6] *Id.* at 1108.

Following the FCC's preemption ruling, on June 7, 1982, the American Telephone and Telegraph Company (AT&T), on behalf of itself and associated Bell System Operating companies, filed a petition for reconsideration. On the same day, General Telephone Company of Ohio sought a "declaratory ruling" ordering the Public Utilities Commission of Ohio to use the same depreciation rates for intrastate purposes as had been prescribed by the FCC. After a joint reply period for the two petitions, the FCC, in a "Memorandum Opinion and Order" released on January 6, 1983 (Premption Order), reversed itself and declared that its "depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates." 92 F.C.C.2d 864, 880 (1983). The FCC based its Preemption Order on both the preemptive effect of § 220 of the Act and the agency's own regulatory

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[6] The FCC in addition stated:

> We have always given special consideration to the needs and views of state commissions in developing accounting and depreciation rules and most State commissions have chosen to follow most accounting and depreciation rules prescribed by this Commission. Departures have nonetheless occurred from time to time.
>
> This Commission has never attempted to prevent any State commission from departing from our accounting and depreciation rules. Indeed we have expressly recognized that State commissions have a right to do so.

89 F.C.C.2d at 1106-07.

power.[7] Although conceding that its depreciation methods would have an immediate upward impact on rates, the FCC reasoned that more timely capital recovery would encourage greater technological progress, which would, in turn, result in more efficient service and lower costs. According to the FCC, "[i]f competition is to be viable, it is necessary for prices to reflect depreciation expenses that are realistic for a competitive market." 92 F.C.C.2d at 877. The FCC concluded: "[W]e find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void." 92 F.C.C.2d at 879.

C. The Proceedings Below.

On May 3, 1982, the South Central Bell Telephone Company (South Central Bell) filed tariff revisions with the Louisiana Public Service Commission (Louisiana Commission) seeking an increase in intrastate rates in the amount of $238,600,000. As partial justification for the increased revenues, South Central Bell relied on the FCC's adoption of remaining life and SLELG depreciation methods in 1980 and the FCC's ruling in 1981 requiring the expensing of station connections. At the time of the filing, the Lousiana Commission required both the use of certain depreciation practices that recovered the cost of an asset at

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[7] The FCC rejected the argument that 47 U.S.C. § 152(b), *see supra* note 2, prohibits the FCC from preempting state depreciation practices. The FCC stated:

> Section 220(b) only prohibits the states from setting depreciation rates for telephone property inconsistent from those prescribed by the FCC. It does not require that any particular tariff for intrastate service be accepted by the state commissions. The setting of depreciation rates and classes of depreciable property only resolves a single issue impacting the ratemaking process. It does not restrict the state commission's broad discretion in setting charges for individual services.

92 F.C.C.2d at 874.

an initially slower rate and the capitalizing, instead of expensing, of station connections. On or about January 7, 1983, the FCC mailed copies of its January 6 Preemption Order to the Louisiana Commission, and on January 19, 1983, the order was published in the *Federal Register*.

The Louisiana Commission on May 19, 1983, denied South Central Bell's request for a rate increase. In its order, the Louisiana Commission expressed concern over Louisiana's declining economy and found the utility's current rate of return, about 13.5%, was comparable to the rate found reasonable in 1981. Thus, because the rates were not increased nor was the rate of return reduced, the Louisiana Commission clearly implied its refusal to implement FCC-prescribed depreciation methods.[8]

In response to the Louisiana Commission's refusal to increase intrastate rates, South Central Bell filed suit in federal district court seeking a preliminary and permanent injunction requiring the Louisiana Commission to implement the depreciation methodologies and the expensing of station connections mandated by the FCC. After a hearing, the district court found that it had jurisdiction under 47 U.S.C. § 401(b) and that the prerequisites of that provision had been met. The district court, however, stated that, in light of the fact that intrastate ratemaking is still within the exclusive province of the states, the court would not order South Central Bell to implement specific tariffs. Instead, the court ordered South Central Bell to comply generally with the FCC Preemption Order and to set new rates within ten days. *South Central Bell Tel. Co. v. Louisiana Public Service Comm'n,* 570 F.Supp. 227, 232-34 (M.D. La. 1983).

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[8] On the same day the Preemption Order was adopted, the FCC issued a ruling in Docket No. 82-576 that prescribed specific SLELG rates to be used in calculating depreciation for South Central Bell equipment. This order, released a few days before the Preemption Order, also declared FCC-prescribed depreciation methods binding on the states. If the Louisiana Commission had used these specific rates, the revenue requirements of South Central Bell would certainly have increased.

On July 7, 1983, the Louisiana Commission, pursuant to the preliminary injunction, issued an order setting new rates. In this order, the Louisiana Commission found that application of the FCC-prescribed accounting methods resulted in an increased expense level of $40,506,000. The Louisiana Commission, however, after reducing the rate of return from 13.5% to 12%, also found that an increase in revenue of only $12,700,000 was needed to meet those increased costs. The Louisiana Commission justified the reduction in the rate of return on the grounds that the prime rate had declined since 1981 and that 7.5% of South Central Bell's total capital was cost-free investment tax credits.[9] No evidence was received in connection with the July 7, 1983 order.

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[9] In its order the Louisiana Commission stated:

> As noted, the Commission denied the rate request of South Central Bell in May, but did not make a determination of the fair rate of return on equity. The currently authorized overall rate of return of South Central Bell was set in 1981, when market interest rates were significantly higher than they are today. The prime rate has remained at about 10-½ per cent for some time. In addition, the rate of return earned by the Company includes a return on unamortized investment tax credits, which constitute approximately 7.5 per cent of South Central Bell's total capital. In fact, however, these tax credits are cost-free investment of the Company, so in reality the rate of return on its investor-supplied equity is higher than that authorized for regulatory purposes. When these factors are viewed in light of the continued high unemployment, we find that a rate of return of equity of 12 per cent is sufficient to assure confidence in the Company's financial soundness, will be adequate to maintain and support its credit and will permit it to raise the capital necessary to perform its public functions. The gross revenue increase necessary to produce a rate of return on equity of 12 per cent after taking account of the ratemaking adjustments proposed by a consultant of the Commission, Bruce M. Louiselle, and recognizing the full amount of the FCC-mandated accounting changes as quantified by South Central Bell, is $12,700,000.

Record at 203.

Soon thereafter, South Central Bell filed a motion in district court seeking to modify the preliminary injunction, or, alternatively, to hold the Louisiana Commission in contempt. The district court, stressing the fact that the Louisiana Commission had not received any additional evidence, found that "the Commision had absolutely no justification for failing to order an increase in revenues sufficient to cover the increased operating costs of the company." 570 F.Supp. at 237. The district court stated:

> The Public Service Commission, here has not complied with the order of this court. The Public Service Commission itself has determined that there is an increase in operating expenses of $40,506,000.00 and, unless there are reasonable and proper adjustments to be made, that increase in operating costs mandates an equivalent increase in revenues. Adjusting fair return on equity downward, in the absence of evidence justifying such an adjustment, was arbitrary and capricious—a simple exercise in arithmetic designed to minimize the increase in telephone rates.

Id. at 237-38. The court concluded that, based on the foregoing, it had no alternative but to accept the Louisiana Commission's finding that South Central Bell had increased expenses of $40,506,000 and to require the Louisiana Commission to increase rates sufficiently to cover that amount. The Louisiana Commission appeals.

II. DISCUSSION.

The Louisiana Commission challenges on appeal the modified preliminary injunction on grounds that (1) the statutory requirements of 47 U.S.C. § 401(b) have not been met, (2) the district court failed to comply with traditional principles of equity in issuing the injunction, (3) the injunction sets intrastate rates in violation of the Communications Act, and (4) under well-established principles of comity the district court should have abstained from exercising jurisdiction over the

case. We note at the outset that the Louisiana Commission does not challenge, and nor can we consider, the validity of the underlying FCC Preemption Order. As the district court correctly held, the exclusive mechanism for obtaining judicial review of FCC action is a direct appeal to the court of appeals pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).[10] *See FCC v. ITT World Communications, Inc.*, 104 S.Ct. 1936, 1939-40 (1984); *Southwestern Bell Tel. Co. v. Arkansas Public Ser. Comm'n*, 738 F.2d 901, 905 (8th Cir. 1984). Thus, because this case concerns the validity of a preliminary injunction issued by the district court pursuant to § 401(b), we assume for purposes of this appeal that the underlying Preemption Order is a legal and proper act of the FCC.[11]

A. Section 401(b).

Section 401(b) provides as follows:

> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after

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[10] Section 2342 provides that "[t]he court of appeals...has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of...all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." Section 402(a) provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter...shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28."

[11] We point out nonetheless that the Fourth Circuit in a § 402(a) proceeding has recently upheld the validity of the Preemption Order. *Virginia State Corp. Comm'n v. FCC*, 737 F.2d 388 (4th Cir. 1984). The Louisiana Commission was an intervenor in those proceedings.

> hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Under § 401(b), a party seeking enforcement of an FCC declaration may obtain an injunction upon a finding that (1) the declaration is an FCC "order" within the meaning of the Act, (2) the order was regularly made and duly served upon the defendant, (3) the defendant is in disobedience of the order, and (4) the party seeking the injunction has been injured by the defendant's disobedience. In the proceeding below, the district court found that all four of these prerequisites had been met. On appeal, the Louisiana Commission disputes the district court's findings that the January 6 Preemption Order (1) was an "order" and (2) had been "duly served," both within the meaning of the Act.[12]

1. The Meaning of "Order."

The Louisiana Commission presents what can be taken to be two distinct arguments for its position that the meaning of the word "order" in the statute does not encompass the FCC January 6 Preemption Order. First, the Louisiana Commission contends that the Preemption Order was issued merely to clarify the law and not to compel state regulatory commissions to take any action. Specifically, the Louisiana Commission asserts that the order merely is an interpretation of the preemptive effect of §220(b), which provides that the FCC "shall, as soon as practicable," make depreciation prescriptions. According to the

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[12] The Louisiana Commission also argues that it is not in disobedience of the Preemption Order or the original injunction. We address this argument in subpart C.

Louisiana Commission, the Preemptive Order is not binding and thus is unenforceable under § 401(b).

In determining the effect of an administrative action, we must, of course, look beyond its label to its substance. *See Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 908-09 (5th Cir. 1983); *Brown Express, Inc. v. United States,* 607 F.2d 695, 700 (5th Cir. 1979). If an administrative agency intends a declaration to be no more than an expression of its construction of a statute or rule, the declaration is "interpretive" in nature and does not have the full force of law. If, on the other hand, an agency acts in accordance with its legislatively delegated rulemaking authority, the declaration is "legislative" in nature and binding on all applicable persons. *Chambers of Commerce of the United States v. OSHA,* 636 F.2d 464, 468 (D.C. Cir. 1980); *Brown Express, Inc., supra,* at 700; *Joseph v. United States Civil Service Comm'n,* 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977). In addition, administrative agencies may make rules of general application in individual adjudicative proceedings. *See Shell Oil v. FERC,* 707 F.2d 230, 235 (5th Cir. 1983).

The district court held that the language of the Preemption Order "is plainly directed to all state regulatory bodies and plainly declares that their depreciation procedures must comply with FCC procedures." 570 F.Supp. at 236. We agree. The FCC adopted the Preemption Order in a rulemaking proceeding only after receiving a significant number of comments and reply comments.[13] Although the FCC stated in the course of the Preemption Order that § 220(b) of the Communications Act

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[13] The FCC received comments from the Arkansas Public Service Commission, the Public Utilities Commission of Ohio, the Public Utilities Commission of the State of California, the Virginia State Corporation Commission, NARUC, the United States Independent Telephone Association, the Ohio Office of Consumers' Counsel, the United Telephone System, Inc., and the Idaho Public Utilities Commission, Inc.

automatically preempted state depreciation policies, the FCC also explicitly relied on its own legislatively delegated power to preempt. 92 F.C.C.2d at 875-80. Indeed, the FCC in the Preemption Order did far more than merely interpret the Act and relevant legislative history. The FCC analyzed the policies underlying its depreciation methodoligies and concluded in no uncertain terms that "this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates."[14] Reading the Preemption Order as a whole, we have no doubt that in issuing the order the FCC intended not merely to advise the public on its interpretation of the preemptive effect of § 220(b), but to preempt as a matter of substantive law inconsistent state practices.[15]

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[14] The FCC also stated:

> In the past the communications marketplace was typified by monopoly conditions and life and salvage factors underlying the state rates were generally very similar, if not identical, to those used by the Commission. In that environment it was not essential that the Commission assert all the authority granted it. See *Computer and Communications Industry Association v. FCC,* [693 F.2d 198 (D.C. Cir. 1982)]. As discussed, *infra,* in the more competitive conditions prevailing today, the utilization of proper methods and rates is more critical if the proper incentives are to be created to insure that the marketplace will function efficiently to bring the benefits of that competition to the ratepayers of this country. Therefore, where it is necessary to protect important federal policies against frustration by inconsistent state actions, we will exercise the full breadth of our depreciation powers.

92 F.C.C.2d at 874.

[15] In so holding, we join the First, Fourth and Eighth Circuits which have also regarded the Preemption Order as a rule of substantive law. *See New England Tel. & Tel. Co. v. Public Utilities Comm'n,* ____ F.2d ____, ____ (1st Cir. 1984); *Virginia State Corp. Comm'n, supra,* at 393-94; *Southwest Bell Tel. Co., supra,* at 904.

Second, the Louisiana Commission contends in effect that the FCC Preemption Order, regardless of its binding effect, is not enforceable under § 401(b) because that provision only applies to those orders that are the product of an adjudicative proceeding. By making this argument, the Louisiana Commission is in effect inviting us to travel down the same path recently traversed by the First Circuit in *New England Tel. & Tel. Co., supra.* After carefully reviewing the arguments both in favor and against adopting such a narrow interpretation of § 401(b), however, we find that we must decline this invitation and instead join the Eighth Circuit in upholding the authority of the district court under § 401(b) to enforce the FCC Preemption Order. *See Southwestern Bell Tel. Co., supra.*

The First Circuit in *New England Tel. & Tel. Co., supra,* based its interpretation of "order" in § 401(b) on several policy considerations.[16] The court expressed concern, first, that, if § 401(b) were construed to allow enforcement of general FCC rules and regulations by private parties, the FCC's primary control over the enforcement of the Communications Act would be seriously undermined. Such a construction, second, would place the interpretation of the rules and regulations in the hands of the some 700 federal district judges, thus threatening the sound development of a coherent nationwide policy. Third, a broad construction of § 401(b) would often result in fractionated review of intrastate rates by encouraging private parties to challenge in federal court discrete aspects of the state ratemaking procedure. Fourth, the court noted that allowing

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[16] The First Circuit also relied on the definition of the word "order" in the Administrative Procedure Act (APA), 5 U.S.C. § 551(6), as at least furnishing a starting point from which to begin the inquiry. As the First Circuit acknowledged, however, the Communications Act was enacted more than ten years before the APA, and the APA itself only makes its terminology mandatory in APA contexts. *See* 5 U.S.C. § 551. In non-APA contexts administrative terminology is still used inconsistently among administrative agencies. *See* B. Schwartz, Administrative Law § 4.1 (2d ed. 1984) (the Treasury continues to call its general rules "decisions" and the FCC continues to call its regulations "orders").

private parties to utilize § 401(b) solely to enforce specific adjudicatory orders would make more intelligible the inability of district courts in § 401(b) proceedings to consider the substantive validity of the underlying order.

While we acknowledge the importance of these policy considerations, we are not persuaded by them to adopt a restrictive construction of the statute. First, the First Circuit was not able to cite, and our own research fails to uncover, a single precedent in support of its interpretation.[17] At least two Supreme Court decisions, however, can be read as providing support for interpreting the term "order" in § 401(b) to include administrative rules. In *Ambassador, Inc. v. United States,* 325 U.S. 317 (1944), the Supreme Court considered the validity of a preliminary injunction issued against hotels in violation of a tariff regulation imposed by the telephone company. The tariff regulation had been filed in compliance with an FCC rulemaking order and had not been specifically upheld by the FCC as reasonable. The Supreme Court, in sustaining the injunction, upheld the district court's determination that the defendant hotels were in violation of the regulation and found that the suit to enjoin the violation was authorized under "§ 401." Although the Court failed to specify the subsection of § 401 to which it was referring, it is clear that the suit had to have been brought under § 401(b) since § 401(a) only authorizes a district court to enjoin violations of the Act itself.[18] If § 401(b) is available to

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[17] Although the First Circuit cites *Kroeger v. Stahl,* 148 F.Supp. 403, 406 (D.N.J.), *aff'd,* 248 F.2d 121 (3d Cir. 1957), in support of the contention that "order" in § 401(b) should be given the same meaning that it has under the APA, we note that *Kroeger* involved not a rule but a "special temporary authorization" that was held not to be a "final disposition."

[18] Section 401(a) provides as follows:

> (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to

enforce tariff regulations filed pursuant to agency rulemaking, the section should surely be available also to enforce rules and regulations of the agency itself.

Furthermore, in *Columbia Broadcasting Systems, Inc. v. United States (CBS),* 316 U.S. 407 (1942), the Supreme Court held that FCC regulations were "orders" within the meaning of § 402(a).[19] In asking us to construe "order" more narrowly in the context of § 401(b) than did the Supreme Court in interpreting the neighboring § 402(a), the Louisiana Commission faces the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Dryers & Cleaners, Inc. v. United States,* 286 U.S. 427, 433 (1932). *See also Hotel Equities Corp. v. CIR,* 546 F.2d 725, 728 (7th Cir. 1976); *Curry v. Block,* 541 F.Supp. 506, 518 (S.D. Ga. 1982), *aff'd,* 738 F.2d 1556 (11th Cir. 1984). This presumption, of course, "is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." 286 U.S. at 433.

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comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

In denying a petition for rehearing, the First Circuit in *New England Tel. & Tel. Co.* distinguishes *Ambassador, Inc.* on the ground that the action in that case might have been brought pursuant to § 401(a). The First Circuit relies on the statement made by the Supreme Court that "a departure from the [tariff] regulation is forbidden by the Act." 317 U.S. at 325. Violating rules and regulations of the FCC though is just as violative of the Act as is disobeying tariff regulations. *See* 47 U.S.C. § 416(c). Under the First Circuit's reasoning, therefore, any regulatory violation would authorize a § 401(a) injunction. We think it is clear, however, in light of the existence of § 401(b), that the scope of a district court's authority under § 401(a) is limited to enjoining violations of specific provisions of the Act and not rulemaking orders or tariff regulations.

[19] *See supra* note 10.

CBS dealt with FCC regulations that precluded a broadcast station from obtaining a license if the station had entered into certain types of contracts with a broadcast network. CBS brought the action under § 402(a) in order to secure judicial review of the regulation. In finding that the regulation was an order within the meaning of § 402(a), the Supreme Court pointed out that, inasmuch as the regulations governed and had an immediate impact upon the contractual relations between the stations and the networks, the implementation of the regulation was not dependent on administrative action. The Court held that, therefore, in order to avoid the harm that would otherwise result from the execution of an illegal regulation, judicial review under § 402(a) was appropriate. According to the Court, "[w]hen, as here, such regulations are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a)." *Id.* at 418-19.

The First Circuit, in considering *CBS,* found that the Court's reasoning did not apply to a § 401(b) proceeding because the same considerations of fairness supporting a broad interpretation of "order" were not present in that context. We disagree. Substantial unfairness can result from either compliance with an improper regulation or noncompliance with a proper one. Especially in the context of a prevasively regulated industry, beneficiaries of a self-executing regulation should not be denied the intended effect of the regulation without recourse merely because the FCC has yet to institute enforcement proceedings. In the instant case, the FCC Preemption Order was issued in response to a preceived failure of the regulatory system to furnish the telephone industry with sufficient cash flow. If each telephone company must wait to receive this benefit until the FCC is able to institute individual enforcement proceedings, telephone companies may well suffer for a significant period of time the harm the Preemption Order was designed to prevent.

Second, we adopt a broad construction of § 401(b) because we are not convinced that the policies put forward by the First Circuit are threatened seriously enough to outweigh the vital policies furthered by private enforcement of FCC rulemaking orders. The FCC has broad discretion to act through either case-by-case adjudication or the rulemaking process. *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947); *Avoyelles Sportsmen's League, Inc., supra,* at 909. Thus, if the FCC deems that enforcement of a certain policy is desirable on an individual basis, it certainly has the discretion to proceed other than by adopting a self-executing rule. To a large extent, therefore, the FCC itself can avoid private incursions upon its enforcement responsibilities. Moreover, through the use of agency intervention and amicus curiae briefs, as well as through the application of the doctrine of primary jurisdiction, the courts and the FCC should be able to prevent both significant inconsistent applications of FCC rules and serious judicial encroachment upon FCC responsibilites. *See, e.g., American Trucking Ass'n v. ICC,* 682 F.2d 487, 491 (5th Cir. 1982) (primary jurisdiction allows court faced with an issue requiring the special expertise of an agency to suspend proceedings pending referral of the issue to the agency for official position).

Most importantly, however, we simply do not see how the FCC's responsibility in developing and enforcing a coherent communications policy would be significantly undermined by giving the FCC discretion to adopt self-executing rules and then to rely in part on private enforcement. We firmly believe, in fact, that under appropriate circumstances such an approach would promote significant federal interests in conserving limited agency resources and in accelerating the implementation of FCC rules and regulations. We can also envision situations in which only a private party would have a sufficient interest in the obedience of an FCC rule to institute an enforcement proceeding. *Cf. FCC v. Sanders Brothers Radio Station,* 309 U.S. 470, 477 (1939) (person with a financial stake in the granting of a license may be the only one with sufficient interest to seek judicial review).

In short, we find that both precedent and sound policy support a broad interpretation of § 401(b) to allow private enforcement of FCC rules and regulations.[20] Therefore, we hold that the FCC Preemption Order is an order within the meaning of § 401(b).[21]

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[20] Further support comes from cases involving § 16(12) of the Interstate Commerce Act, 49 U.S.C. § 16(12) (repealed). The legislative history of § 401(b) indicates that Congress took the text of § 401(b) almost word for word from § 16(12). *See* S. Rep. No. 781, 73d Cong., 2d Sess. 9 (1934). Although some courts have held that under § 16(12) only orders that specifically command certain individuals to take particular actions may be enforced, *see, e.g., Farmer's Loan & Trust Co. v. Northern Pac. Ry.*, 83 F. 249 (D. Wash. 1897), other courts, including the Fifth Circuit, have enforced rules and regulations under the statutory provision. *See Pacific Fruit Express Co. v. Akron, Canton, & Youngstown R.R.*, 524 F.2d 1025, 1031 (9th Cir. 1975), cert. denied, 424 U.S. 911 (1976); *United States v. City of Jackson,* 318 F.2d 1, 9 (5th Cir. 1963).

[21] The Louisiana Commission also argues in its reply brief that South Central Bell is not a "party injured" by the Louisiana Commission's noncompliance with the Preemption Order. We find this argument to be without merit. The FCC reconsidered the preemptive effect of its depreciation policies in response to a petition filed by AT&T on behalf of itself and the associated Bell System Operating Companies, including South Central Bell. 92 F.C.C.2d at 565. *But see South Central Bell Tel. Co. v. Louisiana Public Serv. Comm'n,* 412 So.2d 1069, 1075 n.8 (La. 1982), (South Central Bell held not to be a party in *Computer II* decision for purpose of La. Rev. Stat. Ann. § 45:1180). Moreover, the same policy considerations that persuaded us to adopt a broad reading of "order" equally persuades us to adopt a broad reading of "parties." Finally, we note that courts that have allowed private parties to enforce rules and regulations of the Interstate Commerce Commission under § 401(b)'s sister provision, 49 U.S.C. § 16(12), have regarded as a party any person injured who was a member of the benefited class. *See Carothers v. Western Trans. Co.*, 554 F.2d 799, 805 (7th Cir. 1977); *Pacific Fruit Express Co. v. Akron, Canton, & Youngstown R.R.*, 355 F.Supp. 700, 709 (N.D. Cal. 1973), *aff'd,* 524 F.2d 1025 (9th Cir. 1975), *cert. denied,* 424 U.S. 911 (1976). *Cf. Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Translantic,* 400 U.S. 62, 72 (1970).

2. The Meaning of "Duly Served."

Section 401(b) authorizes a district court to issue a writ of injunction only upon a finding that the underlying FCC order was "duly served." It is undisputed that service was accomplished below both by mail and by publication in the *Federal Register*. Moreover, the Louisiana Commission concedes that it had actual notice of the FCC Preemption Order. The Louisiana Commission, nevertheless, asserts on appeal that the order was not "duly served" within the meaning of the Act because the Louisiana Commission was not personally served with the order. Relying on *Milliken v. Meyer*, 311 U.S. 457 (1940), the Louisiana Commission argues that, in light of the hundreds of mailings the Louisiana Commission receives annually from regulatory agencies, service by mail cannot be considered service reasonably calculated to give actual notice. In addition, the Louisiana Commission contends that it is entitled to personal service because that is the manner of service provided to common carriers under various FCC regulations.

We think the Louisiana Commission misconceives the purpose of the "duly served" prerequisite of § 401(b). There is no indication that the requirement of due service was designed to give a person in violation of an FCC order promulgated according to proper procedure a right to additional notice of that order before enforcement proceedings can commence. Rather, we believe the term "duly served" quite plainly refers only to procedural regularity. *See Southwestern Bell Tel. Co., supra,* at 907. Under this construction, § 401(b), by directing the district court to determine whether "the order was regularly made and duly served," authorizes and requires the district court, although lacking authority to review the substance of an FCC order, to find before issuing an injunction that the order is enforceable as a matter of procedural law. Thus, the requirement of "due service" is met if the defendant in a § 401(b) proceeding received notice legally sufficient to make the order enforceable.

Under the APA, a rule is enforceable once it is published in the *Federal Register*. 5 U.S.C. § 552(a)(1). The Supreme Court has held that appearance of a rule in that publication constitutes legal notice to the general public. *See, e.g., Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384-85 (1947). Although we recognize that some agencies may be required to give additional notice to interested parties as a result of the agencies' own rules and regulations, *see Gardner v. FCC,* 530 F.2d 1086, 1090 (D.C. Cir. 1976), FCC regulations clearly require only notice by publication for rulemaking documents. *See* 47 C.F.R. § 0.445(c).[22] Thus, because the FCC Preemption Order at issue in this case was in fact published in the *Federal Register,* we hold that the order was duly served within the meaning of the Act and enforceable against the Louisiana Commission.

B. Irreparable Injury.

Under traditional principles of equity, a court can usually issue a preliminary injunction only upon a finding of irreparable injury. *See, e.g., Canal Authority v. Callaway,* 489 F.2d 567, 572-73 (5th Cir. 1974). The Louisiana Commission argues that the equitable requirement of irreparable injury also applies to § 401(b) proceedings and that the district court erred in not requiring South Central Bell to make such a showing. It is well-established, however, that, when, as is the case here, an injunction is expressly authorized by statute and the statutory conditions are satisfied, the usual prerequisite of irreparable injury need not be established. *See, e.g., Gresham v. Windrush Partners,* 730 F.2d 1417, 1423 (11th Cir. 1984); *Trailer Train Co. v. State Board of Equalization,* 697 F.2d 860, 869 (9th Cir. 1983),

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[22] We note further that under 47 C.F.R. § 0.445(a), FCC opinions and "orders" require only service by mail. Thus, even if "order" were given the same meaning in FCC regulations that the word has in the context of § 401(b), the Preemption Order would have been "duly served." Although one provision of the Act, § 416(a), requires personal service of FCC orders, that provision by its own terms applies only to carriers.

cert. denied, 104 S.Ct. 149 (1983); *Atchison, Topeka and Santa Fe Ry. v. Lennen,* 640 F.2d 255, 259 (10th Cir. 1981); *Murry v. American Standard, Inc.,* 488 F.2d 529, 531 & n.2 (5th Cir. 1973); *United States v. Hayes International Corp.,* 415 F.2d 1038, 1045 (5th Cir. 1969); *cf. Hecht v. Bowles,* 321 U.S. 321, 331 (1944) (court's discretion under statute expressly authorizing injunction "must be exercised in light of the large objectives of the Act"). The Seventh and Eighth Circuits have already applied this general rule to private parties seeking to enforce under § 401(b) FCC rulemaking orders. *See Illinois Bell Tel. Co. v. Illinois Comm'n,* 740 F.2d 566, 571 (7th Cir. 1984); *Southwest Bell Tel. Co. v. Illinois Commerce Comm'n, supra,* at 908 n.15. Accordingly, we hold that the district court did not err in issuing the preliminary injunction absent a finding of irreparable injury.[23]

C. The Modified Injunction.

As discussed above, the district court issued its modified preliminary injunction upon a finding that the Louisiana Commission had violated the court's original injunction ordering the Louisiana Commission to reset intrastate rates using FCC-prescribed depreciation methodologies and rates. The court found that the Louisiana Commission, in reducing South Central Bell's fair rate of return from 13.5% to 12%, had acted arbitrarily and capriciously and with the sole purpose of covering South Central Bell's increased expenses without having to order a corresponding increase in rates. The district court therefore ordered the Lousisiana Commission to increase rates sufficiently to allow South Central Bell to recover its additional operating expenses in full. On appeal, the Louisiana Commission argues

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[23] Cases cited by the Louisiana Commission in support of the need to find irreparable injury are distinguishable in that they involve implied causes of action. *See, e.g., Rondeau v. Hosinee Paper Corp.,* 422 U.S. 49, 63-64 (1975) (plaintiff in asserting cause of action not authorized expressly by statute or its legislative history is not relieved of the burden of the traditional prerequisites of relief).

that it complied with the original injunction and that it reasonably adjusted the fair rate of return downward to take into account the lower investment risks that would result from compliance with the FCC Preemption Order. In addition, the Louisiana Commission asserts that the dollar-specific terms of the modified injunction constitute an unwarranted intrusion into the Louisiana Commission's responsibility to regulate intrastate rates and is prohibited by § 152 of the Communications Act.

1. The Finding of Non-compliance.

In holding that the Louisiana Commission had violated the injunction, and thus the Preemption Order, by reducing the rate of return merely to minimize telephone rates, the district court necessarily had to make two determinations: (1) that neither the injunction nor the Preemption Order allowed the Louisiana Commission to avoid setting increased rates by simply lowering the rate of return and (2) that the Louisiana Commission did in fact reduce the rate of return other than for a valid reason. We are therefore called upon here not only to review a finding of fact, but also to interpret an FCC order whose substantive validity is beyond our judicial scrutiny.

The district court determined below that under the Preemption Order, "unless there are reasonable and proper adjustments to be made, [the] increase in operating costs mandates an equivalent increase in revenues." 570 F.Supp. at 237. The district court thus held that the Preemption Order, although explicitly only preempting the use of inconsistent state depreciation practices, also barred the states from avoiding the consequences of the Preemption Order by manipulating other independent variables used in computing intrastate rates, such as the rate of return.[24] Although we recognize that under this con-

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[24] By "independent" we do not mean to say that the depreciaiton practices used by a utility have absolutely no effect on the fair rate of return. As the depreciation rate is accelerated, capital recovery is

struction the Preemption Order comes perilously close to undermining completely state authority and discretion to set intrastate rates,[25] we find that, in light of the order's regulatory purpose, we must accept the district court's interpretation.

In the Preemption Order, the FCC stated that preemption is necessary in order to furnish the telephone industry with more timely capital recovery. According to the FCC, greater capital recovery is needed under the competitive conditions that exist today in order to encourage the modernization of facilities and the investment of capital. The FCC stated:

> Approximately 75 percent of exchange plant is allocated to the intrastate jurisdiction. It is clear that unless telephone plant, including that portion subject to allocation to the intrastate jurisdiction, is depreciated at a reasonable rate, improperly timed capital recovery will occur. Indeed, in an increasingly competitive environment, it is possible that improper capital recovery could delay or prevent modernization which would add to the costs borne by ratepayers and could, ultimately, threaten carriers' ability to fully recovery their invested capital. Moreover, the extent of state action attempting to prevent carriers from utilizing our depreciation prescriptions places substantial burdens on carriers and could well impair their ability to raise the investment capital they will need to fully compete in the

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quicker and, as a consequence, the risks to investors may well be reduced. The rate of return, however, is independent in the sense that a regulatory agency in setting the rate of return must take into account factors other than its effect on the costs of services. *See* J. Bonbright, supra note 1, at 148-58.

[25] In his dissenting opinion in *Virginia State Corp. Comm'n v. FCC, supra,* at 398, Judge Widener predicted: "The logical result of [upholding the Preemption Order] is to permit the FCC to abrogate completely the state regulation of intrastate ratemaking for the carriers' intrastate operations in violation of the Communications Act."

> continually evolving competitive telecommunications marketplace. Such a result could undermine the achievement of the Commission's objective to develop policies that will engender a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices.

92 F.C.C.2d at 877. This purpose would plainly be severely frustrated if state regulatory commissions could offset increased expenses by reducing the rate of return without any regard for the companies' needs to compensate investors and to attract new capital.[26] Thus, because we think it is clear that the Preemption Order in prohibiting inconsistent state depreciation practices was intended also to preclude state responses designed to evade the consequences and the purposes of that preemption, we uphold the district court's first determination.

In disputing the district court's second determination, that the rate of return was reduced merely to avoid high telephone rates, the Louisiana Commission challenges a finding of fact. Thus, we apply the "clearly erroneous" standard of review as articulated in Federal Rule of Procedure 52(a). *See Gearhart Industries, Inc. v. Smith International, Inc.*, ____ F.2d ____, ____ (5th Cir. 1984); *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984). The district court's conclusion that the Louisiana Commission had lowered the rate of return without jurisdiction relied largely on the Louisiana Commission's May 19, 1983 order denying a rate increase. As partial justification for that denial, the Louisiana Commission stated: "Since the Company has earned a rate of return comparable to that found to be reasonable by the Commission in [1981], we

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[26] These criteria are the ones usually considered in computing the rate of return. *See, e.g., Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 603 (1943) ("[The rate of return] should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.").

find no justification for an increase in rates at this time." According to the district court, this statement constituted "very clearly a reiteration in 1983 that the rate of return established in 1981 is still in effect." 570 F.Supp. at 237. The district court further found no indication that, between the denial on May 19 and the July 7 order reducing the rate of return, conditions or information available to the Louisiana Commission had changed sufficiently to warrant the downward adjustment. In fact, the district court found that the Louisiana Commission had received no additional evidence during that time. Although on appeal the Louisiana Commission contends that the application of FCC-prescribed depreciation practices is itself sufficient justification for the reduction in the rate of return because of associated lower investor risk, we note that this explanation was never presented to the district court and that it was presented to us for the first time in the Louisiana Commission's reply brief. Based on these considerations, we hold that the district court's finding was not clearly erroneous[27] and that the Lousiana Commission was in fact in violation of the injunction.

2. The Power of the District Court.

The Louisiana Commission asserts two possible grounds for its contention that the modified injunction was beyond the power of the district court because it was dollar-specific. First, the Louisiana Commission contends that, by requiring a specific increase in rates, the district court violated § 152(b) of the Communications Act which prohibits both the FCC and the district court from setting intrastate rates. The district court jusitifed

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[27] While the court apparently did not hold an evidentiary hearing before modifying its injunction, the parties were afforded and took advantage of the opportunity to brief and argue fully their positions to the district court. Moreover, both parties were permitted wide latitude in filing attachments to their briefs and memoranda. *See Commerce Park at DFW Freeport v. Mardian Const. Co.*, 729 F.2d 334, 340 (5th Cir. 1984).

its dollar-specific injunction on the ground that it relied entirely on the Louisiana Commission's own calculations of the impact the FCC-prescribed depreciation practices would have on South Central Bell's expense level. Thus, reasoned the district court, it did not "set rates."

We reject this contention of the Louisiana Commission, but not for the reasons stated by the district court. Section 152(b) states that "nothing in this chapter shall be construed to give [the FCC] jurisdiction with respect to . . . charges . . . for or in connection with intrastate communication." Section 401(b) generally gives the district court authority to enjoin violations of FCC orders. Neither section imposes restrictions on the court's authority to enforce an FCC order; rather, it is clear that under the Act the extent of the court's power to enjoin is commensurate with the reach of the underlying order. That being the case, we cannot determine whether the district court exceeded its authority under the Act in issuing the dollar-specific injunction without also establishing whether the Preemption Order being enforced was an *ultra vires* act of the FCC. Therefore, because we must assume the substantive validity of a FCC order in an appeal from a § 401(b) enforcement proceeding, we must also refrain, as long as the injunction was necessary to the enforcement of the FCC order, from inquiring whether the district court's enforcement action was per se beyond its authority under the Act.

The second ground asserted by the Louisiana Commission in support of its attack on the specific terms of the injunction is that, by ordering an increase in rates in the amount of $40,506,000, the district court exceeded the mandates of the Preemption Order. This argument is without merit. We have already concluded that the Louisiana Commission violated the Preemption Order by manipulating the rate of return for the sole purpose of avoiding high telephone rates. Thus, we have no trouble finding that the injunction requiring a raise in the rates equal to the increase in expenses is sufficiently tailored to

the dictates of the Preemption Order. We note, however, that the Preemption Order only prohibits those changes in the rate of return made merely to avoid the effect of FCC-prescribed depreciation practices. The modified injunction, therefore, will not in the future bar the Louisiana Commission from adjusting the rate of return as long as the determination to do so is made in good faith.

D. Comity.

The Louisiana Commission finally contends that, even if the district court acted within its statutory and equitable authority in issuing the modified preliminary injunction, the principle of comity requires abstention because the matters before the district court were predominantly local in nature.[28] The Louisiana Commission relies on *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341 (1951), in which the Supreme Court held that a district court should abstain from intervening in state regulatory matters that are largely of local concern and fall within the special expertise of state administrative agencies or reviewing courts. *See also Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Gulf Water Benefaction Co. v. Public Utility Comm'n*, 674 F.2d 462 (5th Cir. 1982).

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[28] We reject out of hand the Louisiana Commission's claim that the Johnson Act, 28 U.S.C. § 1342, prohibits the district court from issuing the injunction. The Johnson Act is applicable only when "[j]urisdiction is based solely on diversity of citizenship or repugnance of the [state action] to the Federal Constitution." § 1342(1); *see also DeKalb County v. Southern Bell Tel. & Tel. Co.*, 358 F.Supp. 498, 504 (N.D. Ga. 1972) (all four preconditions must be present before Johnson Act is applicable), *aff'd*, 478 F.2d 700 (5th Cir. 1973). As the district court noted, South Central Bell here asserts jurisdiction under § 401(b) of the Communications Act, not upon any alleged repugnance of the defendant's action to the Constitution. 570 F.Supp. at 234. *See also Chesapeake & Potamac Tel. Co. v. Public Serv. Comm'n*, 560 F.Supp. 844, 847 (D. Md. 1983).

We find that this case is not an appropriate one for abstention. Unlike *Alabama Public Service Comm'n* and *Burford,* this case concerns issues in no way dependent on local factors or local expertise for their resolution. Rather, the claim presented here is predicated upon a naked exercise of the federal preemption power. Under these circumstances, it is well-established that "the basic premise of preemption—avoiding needless federal court intervention into important matters within the state's jurisdiction to regulate—obviously is lacking." *Aluminum Co. of America v. Utilities Comm'n,* 713 F.2d 1024, 1030 (4th Cir. 1983), *cert. denied,* 104 S.Ct. 1326 (1984). *See also Baggett v. Department of Professional Regulation,* 717 F.2d 521, 524 (11th Cir. 1983) ("When, because of preemption, a particular state proceeding is beyond its regulatory authority, the need for protection of the state's comprehensive regulatory scheme . . . lends no support for abstention . . . ."); *International Brotherhood of Electrical Workers v. Public Service Comm'n,* 617 F.2d 206, 212 n.1 (9th Cir. 1980) ("If a preemption claim is well-founded . . . *Burford* abstention cannot be appropriate.). Accordingly, we hold that the district court properly exercised jurisdiction in the instant case.

Iii. CONCLUSION.

For the foregoing reasons, we hold that the district court properly issued the preliminary injunction.

AFFIRMED.

MOTION FILED
OCT 26 1984

No. 84-483

IN THE

Supreme Court of the United States

October Term, 1984

ARKANSAS PUBLIC SERVICE COMMISSION; ROBERT E. JOHNSTON, COMMISSIONER; PATRICIA S. QUALLS, COMMISSIONER; and JAMES W. DANIEL, COMMISSIONER:
Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *ET AL.*, FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF PETITION

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The parties joining in this Motion and Brief as amici curiae are as follows:

The National Association of Regulatory Utility Commissioners (NARUC);

The Public Service Commission of West Virginia;

The Maine Public Utilities Commission;

The Connecticut Department of Public Utility Control;

The Florida Public Service Commission;

The Citizens of the State of Florida;

The National Association of State Utility Consumer Advocates;

The Kansas State Corporation Commission;

The Minnesota Department of Public Service;

The People of the State of California and the Public Utilities Commission of the State of California;

The Louisiana Public Service Commission;

The Public Utilities Commission of Ohio;

The Iowa State Commerce Commission;

The Wisconsin Public Service Commission;

The Michigan Public Service Commission;

The Kentucky Public Service Comission;

The Washington Utilities and Transportation Commission;

The Consumer Advocate for the State of South Carolina; and

The Ohio Office of the Consumers' Counsel.

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IN THE

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MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *ET AL*, FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The National Association of Regulatory Utility Commissioners (NARUC); the Public Service Commission of West Virginia; the Maine Public Utilities Commission; the Connecticut Department of Public Utility Control; the Florida Public Service Commission; the Citizens of the State of Florida; the National Association of State Utility Consumer Advocates (NASUCA); the Kansas State Corporation Commission; the Minnesota Department of Public Service; the People of the State of California and the Public Utilities Commission of the State of California; the Louisiana Public Service; the Public Utilities Commission of Ohio; the Iowa State Commerce Commission; the Wisconsin Public Service Commission; the Michigan Public Service Commission; the Kentucky Public Service

Commission; the Washington Utilities and Transportation Commission; the Consumer Advocate for the State of South Carolina; and the Ohio Office of the Consumers' Counsel hereby respectfully move for leave to file the accompanying brief as amici curiae. The written consent of petitioners the Arkansas Public Service Commission, *et al.* have been obtained and filed with the Clerk of the Court. Respondent Southwestern Bell Telephone Company has refused consent.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the District of Columbia, the Virgin Islands and Puerto Rico, engaged in the regulation of utilities and carriers. More specifically, the NARUC contains the State officials charged with the duty of regulating telecommunications within their respective borders. The NARUC, in its capacity as the representative of the State regulatory utility commissions, participated in the Eighth Circuit in this case as an amicus curiae.

The Public Service Commission of West Virginia, the Maine Public Utilities Commission, the Connecticut Department of Public Utility Control, the Florida Public Service Commission, the Kansas State Corporation Commission, the California Public Utilities Commission, the Louisiana Public Service Commission, the Public Utilities Commission of Ohio, the Iowa State Commerce Commission, the Wisconsin Public Service Commission, the Michigan Public Service Commission, the Kentucky Public Service Commission and the Washington Utilities and Transportation Commission are administrative agencies established under the constitution and laws of their respective States. Among their duties, these State agencies are statutorily required to regulate the intrastate rates and services of telecommunications service providers operating within their borders. Under their statutory provisions, each State utility agency seeks to ensure that intrastate telecommunications service providers operate in the public interest by providing service at rates and charges that are just and reasonable.

The Minnesota Department of Public Service is an independent agency whose purpose it is to represent the interests of all residential and business classes in the State of Minnesota in State and Federal proceedings involving telephone matters.

The citizens of the State of Florida are represented by the Public Counsel of the State. The Public Counsel is authorized, under Chapter 350 of the Florida Statutes, to represent Florida's consumers in all public utility proceedings before State and federal agencies, commissions and courts. NASUCA is a national organization whose membership consists of thirty-six State public utility consumer advocates, including sections of State attorney generals' offices and a citizens' utility board. The Consumer Advocate for the State of South Carolina and the Ohio Office of the Consumers' Counsel are both members of NASUCA.

The decision of the Court of Appeals for the Eighth Circuit which petitioners seek to have reviewed concerns the validity of a decision of the Federal Communications Commission which preempts the States from the exercise of authority over intrastate depreciation rate prescription. Amendment of Part 31, *Memorandum Opinion and Order*, 92 FCC2d 864 (1983). Because the authority to prescribe intrastate depreciation rates is crucial to the ability of the States to discharge their statutorily-imposed duty to ensure that intrastate telecommunications service is provided at rates and charges that are just and reasonable, the NARUC, State utility agencies and utility consumer representatives joining in this motion and brief have a strong interest in this case. The NARUC, *et al.*, believe that the brief they are requesting permission to file may or will present the Court with an understanding of the great importance of this issue to them.

The NARUC, *et. al.*, believe that a brief representing the joint views and perspective of two national organizations, thirteen State utility commissions and four consumer representatives on the importance of the issues involved may or will aid the Court in deciding whether to grant review in this case.

In sum, the issues involved in this case have nationwide impact which should justify the participation of the parties affected hereby. Therefore, the NARUC, *et al.*, respectfully request that this brief be accepted for filing.

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IN THE

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ARKANSAS PUBLIC SERVICE COMMISSION;
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SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *ET. AL.*, AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The National Association of Regulatory Utility Commissioners; the Public Service Commission of West Virginia; the Maine Public Utilities Commission, the Connecticut Department of Public Utility Control; the Florida Public Service Commission; the Citizens of the State of Florida; the National Association of State Utility Consumer Advocates; the State Corporation Commission of Kansas; the Minnesota Department of Public Service; the People of the State of California and the Public Utilities Commission of the State of California; the Louisiana Public Service Commission; the Public Utilities Commission of Ohio; the Iowa State Commerce Commission; the Wisconsin Public Service Commission; the Michigan Public Service Commission; the Kentucky Public Service Commission; the Washington Utilities and Transportation Commission;

the Consumer Advocate for the State of South Carolina; and the Ohio Office of the Consumers' Counsel hereby submit their joint brief as amici curiae in support of the petition for writ of certiorari filed by the Arkansas Public Service Commission, *et al.*, seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in *Southwestern Bell Telephone Company v. Arkansas Public Service Commission et al.*, attached as A-43 to the petition for writ of certiorari filed herein. Pursuant to Rule 36 of the Rules of this Court, a written motion for leave to file this brief is attached hereto.

INTEREST OF AMICI

The decision of the Eighth Circuit which petitioner the Arkansas PSC seeks to have overturned is just one in a group of cases dealing with intrastate depreciation preemption which are of vital concern to State regulators and consumer representatives. The ability of the State utility agencies to discharge their statutorily-imposed duty to regulate intrastate telecommunications in the public interest by setting rates and charges that are just and reasonable is severely impacted by the FCC's preemptive action. What follows is a brief description of the other cases dealing with this issue in which the States and consumer organizations are involved.

I. Fourth Circuit Proceedings Challenging FCC Order

On February 15, 1983, the Virginia State Corporation Commission filed a petition for review before the U.S. Court of Appeals for the Fourth Circuit, seeking review of the FCC's preemption decision. (A-1).

On June 18, 1984, the United States Court of Appeals for the Fourth Circuit upheld the FCC. *Virginia State Corp. Commission v. Federal Communications Commission*, 737 F.2d 388 (4th Cir. 1984). Petitions for Rehearing En Banc were denied by the Court by Order issued October 3, 1984. Petitions for Writ of

Certiorari are expected to be filed with this Court within the statutory period.

II. Ohio Supreme Court Proceedings

On March 9, 1983, the Ohio Public Utilities Commission issued an order setting Cincinnati Bell Telephone Company's intrastate rates. Cincinnati Bell appealed this order to the Ohio Supreme Court asserting, *inter alia*, that the Ohio PUC erred in setting its intrastate rates based on its own and not the FCC's depreciation methodology.

On July 25, 1984, the Ohio Supreme Court upheld the Ohio Commission's decision. The Ohio Court held that the Commission was not bound by the principles of res judicata and hence not obligated to follow the FCC's rulemaking decision. Secondly, the Ohio Court found that the decision by the Ohio PUC was both reasonable and lawful based upon Ohio statutory dictates. *Cincinnati Bell Telephone Co. v. Ohio Public Utilities Commission,* 12 Ohio St. 3rd 280 (1984). That same day, Cincinnati Bell filed a notice of appeal to this Court. Cincinnati Bell's jurisdictional statement was filed with this Court on October 16, 1984.

III. First Circuit Proceedings

In response to an April 26, 1983 order of the Maine Public Utilities Commission, New England Telephone Company filed an action in the U.S. District Court for the District of Maine under 47 U.S.C. § 401(b) seeking to have the Maine Commission set intrastate rates in conformance with the FCC's depreciation methodology. The District Court issued an injunction requiring the Maine Commission to set intrastate rates in conformance with the FCC's wishes. *New England Telephone Co. v. Public Utilities Commission of Maine,* 570 F.Supp. 1558 (D.Me. 1983).

The Maine Commission appealed and, on June 29, 1984, the U.S. Court of Appeals for the First Circuit overturned the District Court's decision. The Court held that the FCC's order

was issued as a product of a rulemaking proceeding and did not constitute an "order" under 47 U.S.C. § 401(b). *New England Telephone Co. v. Public Utilities Commission of Maine*, No. 83-1779 (1st Cir. June 29, 1984). (A-56). A rehearing petition was denied by the Court by order dated September 10, 1984.

IV. Second Circuit Proceedings

On August 11, 1983, the Public Service Board of Vermont declined to increase intrastate rates of the New England Telephone and Telegraph Company to recover depreciation expense according to the FCC's depreciation methodology. The Company filed a motion for temporary injunction pursuant to 47 U.S.C. § 401(b) with the U.S. District Court for the District of Vermont. On December 14, 1983 the Court entered its order denying the injunction, finding that the Board was not a "person" under 47 U.S.C. § 401(b). *New England Telephone and Telegraph Co. v. Public Service Board of Vermont,* 576 F.Supp. 490 (D. Vt. 1984).

The Company filed an appeal with the U.S. Court of Appeals for the Second Circuit, which is pending at this time. *New England Telephone & Telegraph Co. v. Public Service Board of Vermont*, No. 84-7051 (2nd Cir. filed June 27, 1984).

V. Fourth Circuit Proceedings Involving Maryland PSC

On February 18, 1983, the Maryland Public Service Commission declined to apply the FCC's depreciation methodology in setting the Chesapeake and Potomac Telephone Company's intrastate rates. On April 17, 1983, pursuant to suit brought under 47 U.S.C. §401(b) by the Company, the U.S. District Court for the District of Maryland issued an order requiring the Maryland Commission to increase the Company's intrastate rates in accordance with the FCC's methodology. *Chesapeake and Potomac Telephone Co. of Maryland v. Maryland Public Service Commission,* 560 F.Supp. 844 (D. Md. 1983).

An appeal to the U.S. Court of Appeals for the Fourth Cir-

cuit was filed by the Maryland PSC on May 3, 1983. *Chesapeake and Potomac Telephone Co. of Maryland v. Maryland Public Service Commission,* No. 83-1403 (4th Cir. filed May 3, 1983). A decision is pending.

VI. Fifth Circuit Proceedings

On May 19, 1983, the Louisiana Public Service Commission denied a request for increased rates filed by South Central Bell Telephone Company. South Central Bell filed a motion for preliminary injunction, pursuant to 47 U.S.C. §401(b), with the U.S. District Court for the Middle District of Lousiana seeking an increase in rates in conformance with the FCC's depreciation methodology.

The Court granted the injunction, directing the Commission to set rates sufficient to recover the intrastate revenue requirement associated with the FCC's depreciation methodology. *South Central Bell Telephone Co. v. Louisiana Public Service Commission,* 557 F.Supp. 227 (M.D. La. 1983).

An appeal to the Fifth Circuit was filed and on October 11, 1984 the Court issued its decision upholding the issuance of the injunction. *South Central Bell Tel. Co. v. Louisiana Public Service Commission,* No. 83-3494 (5th Cir. Oct. 11, 1984)

VII. Seventh Circuit Proceedings

On December 22, 1983, the Wisconsin Public Service Commission issued an order determining the intrastate rates of Wisconsin Bell, Inc. The Company filed a motion for a preliminary injunction in the U.S. District Court for the District of Wisconsin seeking to compel the Commission to increase its intrastate rates in conformance with the FCC's depreciation methodology. A decision by the Court is pending. *Wisconsin Bell, Inc. v. Public Service Commission of Wisconsin,* No. 84-C-0004 (D. Wisc. filed Jan. 4, 1984).

VIII. Eighth Circuit Proceedings Involving Iowa SCC

On October 4, 1983, the Iowa State Commerce Commission issued an order denying Northwestern Bell Tel. Co.'s request for increased rates based on use of the FCC's depreciation methodology.

The Company filed a motion for a permanent injunction with the U.S. District Court for the Southern District of Iowa, pursuant to 47 U.S.C. §401(b). On September 27, 1984 the Court issued a permanent injunction against the Iowa SCC. *Northwestern Bell Tel. Co. v. Iowa State Commerce Commission,* No. 83-688-A (S.D. Iowa Sept. 27, 1984).

IX. Ninth Circuit Proceedings

On February 10, 1983, the Washington Utilities and Transportation Commission issued an order declining to increase the intrastate rates of Pacific Northwest Bell Telephone Company in conformance with the FCC's depreciation methodology.

Pacific Northwest Bell filed suit in the U.S. District Court for the Western District of Washington seeking to have its intrastate rates set in conformance with the FCC's decision. The Court issued a preliminary injunction on March 10, 1983. *Pacific Northwest Bell Telephone Company v. Washington Utilities and Transportation Commission,* 565 F.Supp. 17 (W.D. Wash. 1983).

The Washington UTC appealed to the U.S. Court of Appeals for the Ninth Circuit. That appeal is pending. *Pacific Northwest Bell Telephone Co. v. Washington Utilities and Transportation Commission,* No. 83-3746 (9th Cir. filed April 19, 1983).

X. Tenth Circuit Proceedings

On March 23, 1983, the Kansas State Corporation Commission rejected Southwestern Bell Telephone Company's request for increased rates to reflect FCC approved depreciation methods.

Southwestern Bell filed a motion for a preliminary injunction with the U.S. District Court for the District of Kansas. On April 8, 1983 the Court issued the requested injunction pending final judicial review of the FCC's depreciation rule. *Southwestern Bell Telephone Co. v. State Corporation Commission of Kansas,* No. 83-4090 (D. Kan. April 8, 1983).

SUMMARY OF ARGUMENT

The threshold issue raised by Arkansas in its petition for writ of certiorari is whether, under section 401(b) of the Communications Act of 1934, a federal district court may deny enforcement of an FCC decision because it finds that the FCC has acted outside the scope of its authority in issuing the decision. Amici NARUC, *et al.,* believe that a district court does retain its equitable powers under 47 U.S.C. §401(b) to go beyond the express language of an enforcement statute, especially where, as here, the public interest is involved.

Furthermore, Amici NARUC, *et al.,* believe that the District Court below properly exercised its equitable powers to deny enforcement of the FCC's depreciation preemption decision. In issuing its decision the FCC acted outside the scope of its statutory authority under the Communications Act of 1934. Section 220(b) of the Act, which the FCC cites as authority for its ruling, does not grant it this authority. Moreover, the former Bell System Operating Companies to whom its decision applies are now "connecting carriers" within the meaning of 47 U.S.C §152(b)(2), and, as such, are not subject to FCC jurisdiction as to their ratemaking function. Additionally, the FCC has failed to justify its preemption on the ground that it was necessary to avoid frustration of a valid federal purpose.

Finally, there is a conflict among the circuit courts of appeal as to whether the FCC's decision is enforceable by private parties under 47 U.S.C. §401(b). Amici NARUC, *et al.,* agree with the Court of Appeals for the First Circuit that only adjudicatory "orders" and not "rules" may be enforced by private parties under 47 U.S.C. § 401(b) and that the FCC's depreciation deci-

sion constitutes an unenforceable "rule" within the meaning of the Administrative Procedure Act, 47 U.S.C. § 551(4).

ARGUMENT

a. The decision of the court below conflicts with decisions of this Court recognizing that federal district courts retain equity jurisdiction, under enforcement statutes, to deny enforcement of agency decisions.

Broadly stated, the issue raised by this case is whether a federal district court may invoke its inherent power as an equity court to avoid what it deems to be an inequitable result. More specifically, the issue is whether, under §401(b) of the Communications Act, 47 U.S.C. §401(b), a federal district court may deny enforcement of a Federal Communications Commission decision because it finds that the FCC has acted outside the scope of its statutory authority in issuing the decision.

This is a case of first impression for this Court. The proper construction of §401(b) has never been presented to this Court for review. The U.S. District Court for the Eastern District of Arkansas determined that §401(b) did grant its discretion to deny enforcement. (A-36).[1] That court then proceeded to dismiss plaintiff Southwestern Bell's suit under §401(b) because it found that the FCC did not have the statutory authority to issue the decision which Southwest Bell sought to have enforced. (A-36). Upon review, the Court of Appeals for the Eighth Circuit reversed, finding that "[t]he district court had no jurisdiction to deny enforcement of the FCC order on the basis that it was ultra vires." (A-52). Amici NARUC, *et al.*, submit that the Court of Appeals erred and that application of the principles enunciated by this Court in cases construing enforcement provisions very similar to §401(b) leads to the inescapable conclusion that under §401(b) a district court retains its equitable

[1]References are to the Appendix attached to Arkansas' Petition for Writ of Certiorari.

powers and may properly deny enforcement of an FCC decision.

Hecht v. Bowles, 321 U.S. 321, 88 L.Ed. 754, 64 S.Ct. 587 (1944), is a compelling precedent for this case. At issue in *Hecht* was the construction of the enforcement provision contained in the Emergency Price Control Act of 1942.

The Act's Administrator argued that, having established that a defendant had engaged in acts or practices violative of §4 of the Act, he was entitled as of right to an injunction restraining the defendant from engaging in such acts or practices. In deciding the case, this Court rejected the Administrator's argument and held that there was "some room for the exercise of discretion on the part of the Court." 321 U.S. at 328. After noting that §205(a) provided that an injunction "shall be granted" against a violation, this Court stated that "[a] grant of jurisdiction to issue compliance hardly suggests an absolute duty to do so." *Id.* at 329-330. It emphasized the fundamental character of equity jurisdiction in interpreting §205(a) to

> afford a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practice, as conditioned by the necessities of the public interest which Congress has sought to protect.
>
> *Id.* at 330.

Cases interpreting the enforcement provision contained in the Freedom of Information Act (FOIA), 5 U.S.C. §552 (a)(4)(B), also have granted district courts the discretion to refuse enforcement. In dealing with a request for presidential records under the FOIA, the U.S. Court of Appeals for the D.C. Circuit stated that the District Court "ha[d] the equitable power to protect Mr. Nixon's constitutional interests." *Reporters Committee for Freedom of the Press v. Sampson,* 591 F.2d 944, 949 (D.C. Cir. 1978). In deciding upon a request for disclosure of deleted portions of the transcript of a background press conference held by a former Secretary of State, the same court stated that an

injunction should be denied if the district court determined that release of the material would do damage to the national security. *Halperin v. Dept. of State,* 565 F.2d 699 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1046 (1978). *See also Doyle v. U.S. Department of Justice,* 494 F.Supp. 842, 845 (D.D.C. 1980), *aff'd,* 668 F.2d 1365 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 1002 (1982). These lower court cases acknowledged and applied the principles enunciated by this Court in *Renegotiation Board v. Bannercraft Clothing Co.,* 415 U.S. 1, 39 L.Ed.2d 123, 94 S.Ct. 1028 (1974). In *Renegotiation Board* this Court stated:

> With the express vesting of equitable jurisdiction in the district court by §552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court.
>
> 415 U.S. at 20.

This Court has noted that it is especially important to allow a district court the discretion to go beyond the express language of an enforcement statute when the public interest is involved, as it is in this case. In *United States v. First National City Bank,* 379 U.S. 378, 13 L.Ed.2d 365, 85 S.Ct. 528 (1965), a case involving the enforcement provision of the Internal Revenue Code, 26 U.S.C. §7402(a), this Court stated that

> courts of equity may and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.

378 U.S. at 383 *quoting Virginian R. Co. v. Federation,* 300 U.S. 515, 552 (1937).

Application of the principles outlined above to this case leads to the conclusion that the district court has discretion in considering whether to grant enforcement. In furtherance of this discretion it may properly consider objections to the validity of the FCC's order. As a court of equity in an enforcement proceeding, it is not precluded from scrutinizing the order sought to

be enforced to determine whether the FCC has traveled outside the scope of its authority. *Leedom v. Kyne,* 358 U.S. 184, 3 L.Ed.2d 210, 79 S.Ct. 180 (1958). An agency may not bootstrap itself into an area in which it has no jurisdiction by violating its statutory mandate. *Federal Maritime Commission v. Seatrain Lines, Inc.,* 411 U.S. 726, 745, 36 L.Ed.2d 620, 93 S.Ct. 1773 (1973).

The Eighth Circuit's rejection of the District Court's equity jurisdiction must not be allowed to stand.

b. The decision below involves an important question of federal law which should be settled by this Court.

The gravamen of petitioner Arkansas' dispute with Southwestern Bell is that the FCC acted outside the scope of its authority under the Communications Act of 1934 in preempting the authority of the States to prescribe depreciation rates for intrastate ratemaking purposes. The FCC based its decision to preempt on §220(b) of the Communications Act, 47 U.S.C. §220(b). But, as the District Court below properly determined, §220(b) does not grant it this authority. (A-36).

Section 220(b) does not explicitly or implicitly preempt State prescription of depreciation rates. Nothing in §220(b) directs State commissions to take any particular action with respect to depreciation and accounting. The authority explicitly granted to the FCC under section 220(b) is limited solely to regulation of interstate communications. On the other hand, explicit provisions of section 2(b) of the Communications Act of 1934, 47 U.S.C. §152(b), explicitly deny the FCC jurisdiction over

> charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. 47 U.S.C. § 152(b).

Hence, by explicit statutory provision, the FCC can prescribe depreciation rates for interstate ratemaking purposes, but is precluded from prescribing depreciation rates for intrastate

ratemaking purposes. Intrastate ratemaking authority is reserved to the States.

A review of the legislative history of Section 220 confirms that Congress did not intend to displace State authority over depreciation and accounting. In fact, the contrary is true. The entire Communications Act of 1934, including §220, was perceived as supplementing, rather than supplanting, State authority. *See Hearings on S.2910 Before the Senate Committee on Interstate Commerce,* 73rd Cong., 2d Sess. 155, 156 (March 14, 1934); *see also* 78 Cong. Rec. 8823 (1934).

Section 220(b) was derived from §20(b) of the Interstate Commerce Act. *See* S. Rept. No. 781, 73rd Cong., 2d Sess. 5 (1934); H.R. Rept. No. 1850, 73rd Cong., 2d Sess. 3, 7 (1934). The primary purpose of that section was to deal with problems associated with railroad regulation and not to preempt State prescription of depreciation rates. *See* H.R. Rept. No. 450, 66th Cong., 1st Sess. 10-11 (1919). Indeed, subsequent Interstate Commerce Commission practice did not preempt State prescription of depreciation and accounting practices. Instead, the ICC acknowledged its dependence upon State regulation of telephone companies for *interstate* depreciation and accounting purposes. *See Depreciation Charges of Telephone Companies,* 118 I.C.C. 195, 374-375 (1926).

A reading of subsection (j) of §220 also bears out the view that Congress did not intend to limit the intrastate ratemaking authority of the States by preempting inconsistent State depreciation and accounting prescriptions. Subsection (j) calls upon the FCC to investigate and to report to Congress on the need for legislation to "define further or harmonize the powers of the Commission and of the State commissions with respect to matters to which this section relates." If Congress had intended the FCC to preempt inconsistent State prescribed depreciation rates, no Congressional action would be required to harmonize State and federal powers. By enacting subsection (j) Congress made it clear that, through the further enactment of legislation,

it would be the final arbiter of any disputes between States and the FCC arising under §220. By preempting State authority over depreciation rates, the FCC has improperly substituted its judgment for that of Congress in resolving disputes over the jurisdictional scope of §220.

The FCC also concluded that even if §220 did not provide it with the statutory authority to preempt, preemption was still justified in this case to avoid the frustration of a validly adopted federal purpose under principles laid down in *North Carolina Utilities Commission v. FCC,* 537 F.2d 787 (4th Cir.), *cert. denied,* 429 U.S. 1027 (1976) (*NCUC I*). In that case the Fourth Circuit upheld the FCC's conclusion that States may not regulate the interconnection of customer-provided equipment in any way that conflicts with the FCC's regulation in the area. *NCUC I* was expanded in *Computer & Communications Industry Ass'n v. FCC,* 693 F.2d 198 (D.C. Cir.), *cert. denied,* 103 S.Ct. 2109 (1983) (*Computer II*), where the issue involved the deregulation of customer-provided equipment.

The FCC's reliance on *NCUC* and *Computer II* is misplaced. Those cases involved a subject matter and a conflict very different from that which exists here. They concerned the impossibility of complying with both State and federal regulatory schemes. Here, the FCC has preempted not because of impossibility but in order to overcome a perceived obstacle to a federal goal. Indeed, as noted by the Court of Appeals for the Fourth Circuit, "the instant appeal raises no question of actual physical impossibility of complying with dual federal and State regulation." *Virginia SCC,* 737 F.2d at 396.

Those cases involved FCC regulation of plant and facilities used interchangeably for intrastate and interstate communications. Preemption was necessary because dual regulation was impossible. But what is at issue in this case is the right of each State to prescribe depreciation practices in an intrastate ratemaking context relating to plant costs already divided and allocated to the intrastate jurisdiction for recovery. Preemption in this context is unjustifiable.

Furthermore, the Modified Final Judgment (MFJ) and the Reorganization of the Bell System effected in *United States v. Western Electric Co.*, No. 82-0192 (D.D.C. 1982) fundamentally altered the nature of the Bell Operating Companies' (BOCs) business and altered their jurisdictional status under the Communications Act. By divesting them of assets used jointly for interstate toll and exchange services and limiting them solely to intrastate, exchange operations, the MFJ changed the BOCs from "common carriers" subject to the Act in various ways, to "connecting carriers" which are not subject to the Communications Act or the jurisdiction of the FCC, except for specific limited purposes not relevant to their ratemaking function.

The purpose of the MFJ and the Reorganization was to sever AT&T's control over the BOCs and their "bottleneck" exchange facilities. This was accomplished by AT&T's divestiture of stock ownership in the BOCs and the division of assets which divested the BOCs of all assets, facilities, personnel and rights to technical information except those necessary for the BOCs to perform exchange telecommunications functions. *United States v. Western Electric Co.*, 552 F.Supp. 131, 200-201 (D.D.C. 1982), *aff'd sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983).

The separation of assets of the Bell System companies performing exchange functions and those performing interexchange functions coincides with the jurisdictional division in the Communications Act between "common carriers" and "connecting carriers." A "common carrier" under the Act is defined at 47 U.S.C. §153(h) as "any person engaged as a common carrier by wire, interstate or foreign communications by wire or in interstate or foreign transmission of energy, except where reference is made to common carriers not subject to the Act." A "common carrier not subject to the Act" is a "connecting carrier" defined at 47 U.S.C. §§153(u) and 152(b)(2-4) as, *inter alia:*

> (2) any carrier engaged in interstate or foreign communication solely through physical connection with

> the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . .
>
> 47 U.S.C. §152(b)(2).

The BOCs, having been limited by the MFJ to performing exchange and exchange access functions, are engaged in interstate and foreign communications "solely through physical connection with the facilities of another carrier." There is no common direct or indirect control with a common carrier by virtue of AT&T's relinquishment of stock ownership and other devices of control. They are therefore "connecting carriers."

The relegation of BOCs to the status of "connecting carriers" has important jurisdictional consequences. "Connecting carriers" are subject only to §§201 through 205 of the Communications Act "except as otherwise provided therein." They are not subject to §220, the section upon which the FCC based its authority to set intrastate depreciation rates. Consequently, the FCC's decision exercising authority to govern the depreciation rates used by these companies is without statutory basis and must be rejected.

c. This case should be reviewed by this Court because it presents a conflict in decisions rendered by two courts of appeal.

There is a conflict among the circuit courts of appeal on the issue of whether the FCC's preemption decision is enforceable by private parties under 47 U.S.C. §401(b). The Eighth Circuit held that the ruling could be enforced by private parties as a self-executing order of an administrative agency. In a later decision, the First Circuit cited the Eighth Circuit's decision and expressly declined to follow it, stating:

> [N]one of the courts granting injunctions, aside from the district court below, have directly addressed the question the Maine Public Utilities Commission has raised here: whether the FCC's decision constitutes an

> "order" in the contemplation of Section 401(b). We conclude that it does not, for several reasons.

New England Telephone and Telegraph Co. v. Public Utilities Commission of Maine, et al., Docket No. 83-1779 slip. op. at 6 (June 29, 1984) (A-56).

The First Circuit found the FCC's preemption decision to be a "rule" and not an "order" within the meaning of §401(b). The court found that the decision fit the description of "rule" in the Administrative Procedures Act as "any agency statement of general . . . applicability and future effect designed to implement, interpret or prescribe law or policy . . ." 5 U.S.C. §551(4).

The First Circuit further held that only adjudicatory orders, and not rules, could be enforced by private parties under §401(b). The Court first relied on the APA definition of "order" which excludes final decisions in rulemaking proceedings. 5 U.S.C. § 551(6). (A-61). The Court also held that to apply 401(b) more broadly and permit private enforcement of rules would undermine manifest congresional intent that enforcement of the Communications Act be primarily entrusted to the FCC. *Massachusetts Universalist Convention v. Hildreth & Rogers Co.,* 183 F.2d 497, 500 (1st Cir. 1950); *Lechtner v. Brownyard,* 679 F.2d 322, 327 (3rd Cir. 1982). (A-62). Noting further that rules are often general in form, the First Circuit held that such a construction would place the interpretative function "in the hands of private parties and 700 federal district judges, instead of in the hands of the Commission. At best, responsibility for uniform policy would rest in the hands of an overworked (and inexpert) Supreme Court." *New England Tel.,* slip. op. at 12. (A-64).

The First Circuit also found that its construction of §401 (b) was essential to preserve procedural fairness to parties. Noting that review of the agency order for which enforcement is sought in a district court under 47 U.S.C. §401(b) is reserved to circuit courts of appeal under 28 U.S.C. §2342(1), the court stated:

> This "split" of power between circuit and district courts (leaving 'review' to the first and 'enforcement against the disobedient' to the second) makes a degree of sense where an 'adjudicatory' order is at issue, for the 'disobedient person' in such a case was likely a party to the order and might have sought review of the agency decision in the circuit court. It makes far less sense and is far less fair in the case of an agency rule, which might well be enforced against persons not parties to the rulemaking proceeding.
>
> *New England Tel.*, slip. op. at 14 (A-65).

47 U.S.C. §401(b) also requires that a party must fail or neglect to "obey an order" of the FCC before injunctive relief is available. Both common sense and federal jurisprudence dictate that to be in violation of an "order" one must have been directed to do or not do a certain act. 49 U.S.C. §16(12), (now repealed) was the forerunner of 47 U.S.C. §401(b). The cases decided pursuant to that statute required that the party sought to be enjoined must be in violation of an order or directive commanding the party to take or not take some action. *See, e.g., McFaddin Express, Inc. v. Adley Corp.*, 346 F.2d 424 (2d Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966); *Interstate Commerce Commission v. Western N.Y. & P.R. Co.*, 82 F.192 (W.D. Pa. 1897).

The requirement that §401(b) apply only in situations where the defendant was actually a party to the proceeding that gave rise to the order or was actually directed to take some action in the order, is further supported by the jurisprudence interpreting the definition of "order" contained in the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*, which provides:

> (6) "Order" means the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but not including licensing;
>
> 5 U.S.C. § 551(6).

In defining an "order" as a "final disposition," Congress in-

tended that orders would have some specific consequences for the parties to the proceeding which gave rise to that order. This Court so found in *International Tel. & Tel. Corp. v. Local 134,* 419 U.S. 429, 95 S.Ct. 600, 42 L.Ed.2d 558 (1975).

The First Circuit's reasoning is directly applicable to the issues raised in the Arkansas PSC's petition. The Arkansas Commission was not a party to the FCC proceeding, the FCC's ruling had no "determinate consequences" for the Arkansas Commission and the FCC did not order the Arkansas Commission to do anything in its ruling. Therefore, the Arkansas Commission is not in "disobedience" of an FCC "order" and the decision of the Eighth Circuit Court of Appeals should be reversed.

CONCLUSION

For all the foregoing reasons, we respectfully urge this Court to issue a writ of certiorari to the U.S. Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Nos. 84-483, 84-870 and 84-900

In the Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS PUBLIC SERVICE COMMISSION, ET AL., PETITIONERS

v.

SOUTHWESTERN BELL TELEPHONE COMPANY

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL., APPELLANTS

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF MAINE, ET AL.

ON APPEAL AND ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST, FIFTH AND EIGHTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a district court asked to enforce an order of the Federal Communications Commission (FCC) under 47 U.S.C. 401(b) may deny enforcement on the ground that the order is ultra vires, where exclusive jurisdiction to determine the lawfulness of FCC orders rests in the courts of appeals, a petition for review of the pertinent FCC order is pending in a court of appeals at the time enforcement is sought in a district court, and a stay could be sought in the court of appeals.

2. Whether the Federal Communications Commission's order preempting inconsistent regulation by state commissions is an "order" that may be enforced under 47 U.S.C. 401(b).

3. Whether a district court exceeded its authority to enforce an order of the Federal Communications Commission by requiring a state commission to permit a telephone company to increase its rates by a specific amount so as to comply with depreciation methods prescribed by the Federal Communications Commission.

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ON APPEAL AND ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST, FIFTH AND EIGHTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitations to the Solicitor General to express the views of the United States.

STATUTES INVOLVED

Relevant statutes are set forth in the petitioners' appendix (at A71-A74) in No. 84-483.

STATEMENT

The Federal Communications Commission (FCC) determined in 1983 that state commissions could not order telephone companies to use depreciation methods contrary to those the FCC had prescribed. That order was affirmed on review by the Fourth Circuit, which had exclusive jurisdiction to determine the validity of the order and to stay or enjoin it pending review. The three cases addressed in this brief all involve disputes between telephone companies and state commissions that refused to permit the telephone companies to follow the depreciation methods prescribed by the FCC. In each case, the telephone company filed an enforcement action in a federal district court pursuant to 47 U.S.C. 401(b), seeking to compel the state commission to permit it to use the FCC's depreciation methods in state ratemaking proceedings. In the Arkansas case, No. 84-483, the Eighth Circuit overturned a district court order refusing to enforce the FCC's order on the ground that the decision was ultra vires. In the Maine case, No. 84-900, the First Circuit held that the FCC's decision that state commissions were preempted from requiring the use of inconsistent depreciation methods was not the type of "order" that telephone companies could enforce under Section 401 (b), and so it vacated an injunction issued by a dis-

trict court. In the Louisiana case, No. 84-871, the Fifth Circuit expressly rejected the First Circuit's conclusion in the Maine case and upheld an injunction issued by a district court.

1. Section 220(b) of the Communications Act of 1934, 47 U.S.C. 220(b), authorizes the FCC to prescribe "classes of property" for which depreciation may be charged and to prescribe depreciation procedures; it states that carriers "shall not" use any other classifications or depreciation procedures. In 1980, the Commission issued an order making two changes in the depreciation procedures used by telephone companies. *In re Property Depreciation*, 83 F.C.C.2d 267 (1980), reconsideration denied, 87 F.C.C.2d 916 (1981).[1] The next year, the Commission issued an order providing that a previously depreciable class of property should thenceforth be treated as a current expense. *In re Uniform System of Accounts*, 85 F.C.C.2d 818 (1981).[2] The Commission made each of these changes because it concluded that the prior practices had led to out-of-phase capital recovery and misallocation of costs, which conflicted with the FCC's recently adopted policy of en-

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[1] That decision substituted "equal life grouping" in place of "vintage grouping" and the "remaining life" method of correcting errors in forecasts in place of the "whole life" method. These depreciation rules are described briefly in our Motion to Dismiss and Brief in Opopsition at 5-6 [hereinafter cited as Fourth Circuit Opposition], in *Louisiana Public Service Comm'n* v. *FCC*, No. 84-871 et al., in which the appellant and the petitioners seeks further review in this Court of the Fourth Circuit's decision affirming the FCC's preemption decision.

[2] That decision determined that "inside wiring" should be treated as a current expense rather than capitalized. The decision is described briefly in our Fourth Circuit Opposition at 7.

couraging competition and otherwise were inconsistent with the public interest. The new depreciation methods are intended to make the marketplace operate more efficiently. 84-483 Pet. App. A19-A22.

The FCC, at the request of state commissions and telephone companies, considered whether its depreciation decisions prohibited states from requiring telephone companies to use inconsistent depreciation practices in state ratemaking proceedings. After first deciding that state commissions were not preempted (*In re Uniform System of Accounts*, 89 F.C.C.2d 1094 (1982)), the Commission unanimously determined that state commissions had to follow its recent depreciation decisions if the purposes of those decisions were not to be frustrated. The Commission also determined that Section 220(b), as a matter of law, ousted the states from any role in setting depreciation rates for telephone equipment used in part for interstate services unless the FCC expressly authorized such a role (84-483 Pet. App. A1-A34). The FCC gave general notice of this order (the *Preemption Order*) by publication in the *Federal Register* and by serving a copy of its order on each state commission (*id.* at A25).

Pursuant to the Administrative Orders Review Act of 1950, 28 U.S.C. 2341 *et seq.*, known as the Hobbs Act, a court of appeals may review an FCC order, such as the *Preemption Order*, if a petition is filed within 60 days. The court of appeals in which the petition is filed has "exclusive jurisdiction to make and enter * * * a judgment determining the validity of * * * the order of the agency" (28 U.S.C. 2349 (a)). A statutory transfer procedure provides that all review of an agency order may be centralized in one court of appeals (28 U.S.C. 2112(a)). That

court of appeals may stay the FCC order pending judicial review, on a proper showing (28 U.S.C. 2349 (b); Fed. R. App. P. 18).

The *Preemption Order* was appealed to the Fourth Circuit by the Virginia State Corporation Commission. The Louisiana commission and the Arkansas commission intervened in that proceeding and participated in the briefing, along with 15 other state commissions. None of the parties sought to stay the FCC's order. The Fourth Circuit upheld the *Preemption Order* in June 1984. Applying this Court's decision in *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1982), the court of appeals held that the FCC acted within the scope of its "authority to insure efficient operation of the interstate telephone network." *Virginia State Corporation Comm'n* v. *FCC*, 737 F.2d 388, 394 (4th Cir. 1984). A jurisdictional statement and three petitions for a writ of certiorari have been filed seeking review of that decision (Nos. 84-871, 84-889, 84-1054 and 84-1069).

2. The Arkansas case arose after the FCC's *Preemption Order* but prior to the Fourth Circuit's decision. A "three-way meeting" was held by the FCC, the Arkansas Public Service Commission, and Southwestern Bell.[3] Following the meeting, the FCC issued an order, in December 1983, prescribing depreciation rates for Southwestern Bell's operations in Arkansas. *In re Prescription of Revised Percentages of Depre-*

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[3] The FCC historically has called periodic "three-way meetings" of telephone companies and federal and state regulators to consider depreciation rates for particular companies. See *In re Prescription of Revised Percentages of Depreciation*, 88 F.C.C.2d 1223, 1225 (1982).

ciation, 96 F.C.C.2d 257, 291 (1983). The order made clear that state commissions were required to follow the prescribed depreciation procedures (*id.* at 261-262 n.3). No party sought review of that order.

In January 1984, the Arkansas commission denied Southwestern Bell's rate proposal, which had sought to recover increases in depreciation expenses that the telephone company had calculated on the basis of the FCC's prescriptions. *Re Southwestern Bell Telephone Co.*, 58 Pub. Util. Rep. 4th (PUR) 82 (Ark. P.S.C. 1984). The Arkansas commission took "administrative notice" of the FCC's December 1983 depreciation order for Southwestern Bell's operations in Arkansas (*id.* at 90); but it refused to comply with that order and with the *Preemption Order*, stating that it was "convinced that the FCC is totally without any valid legal foundation to support its claim of preemption over the states with regard to intrastate depreciation rates" (*id.* at 93-94).

Southwestern Bell then sought enforcement of the FCC's orders in the United States District Court for the Eastern District of Arkansas under 47 U.S.C. 401(b). Section 401(b) provides that, if "any person fails or neglects to obey any order of the [FCC] * * * any party injured thereby * * * may apply to the appropriate district court of the United States for the enforcement of such order." The statute provides that the district court "shall enforce obedience to such order" if it finds that the order was "regularly made and duly served." The Arkansas commission stipulated that it was not obeying the *Preemption Order* and that the order was "regularly made and duly served." It disputed the FCC's authority to issue depreciation prescriptions that preempt state commissions.

The district court, in an opinion issued prior to the Fourth Circuit's decision upholding the *Preemption Order*, refused to enforce the FCC's orders. It noted that, under the Hobbs Act, "only a court of appeals may invalidate an FCC order" (Pet. App. A36). But the district court denied enforcement after determining that the *Preemption Order* was "ultra vires" because its prescription of uniform depreciation procedures necessarily affected intrastate ratemaking (*ibid.*).

The Eighth Circuit reversed (Pet. App. A43-A55). It noted that this Court had made clear, in *FCC* v. *ITT World Communications, Inc.*, No. 83-371, slip op. 4 (Apr. 30, 1984), that "[l]itigants may not evade" the provision of the Hobbs Act providing that exclusive jurisdiction to review FCC orders lies in the courts of appeals by arguing in a district court that an FCC order is ultra vires. But the district court had "countenanced just such an evasion" by the Arkansas commission (Pet. App. A50). The Eighth Circuit did not read the Hobbs Act as "withholding all discretion from the district court with respect to the issuance of an injunction," but concluded that, under the facts of this case, a refusal to enjoin the Arkansas commission's disobedience would be an abuse of discretion (*id.* at A54). The Eighth Circuit noted that the Arkansas commission was participating in the Fourth Circuit's review of the *Preemption Order* but had not sought a stay in that Court. The Eighth Circuit characterized the Arkansas commission's action as a "studied consideration of * * * defiance" of the FCC's order (*id.* at A54). It therefore ordered the district court to enter the injunction requested by Southwestern Bell, noting that it

could reconsider the injunction when the Fourth Circuit ruled on the validity of the *Preemption Order*.[4]

3. The Maine case arose in July 1982, when New England Telephone sought a rate increase from the Public Utilities Commission of Maine based on the depreciation methods prescribed by the FCC. As in the Arkansas case, the Maine commission refused to permit the telephone company to follow the FCC's prescriptions because it held that "the FCC erred" in concluding that it could issue preemptive depreciation prescriptions. *New England Telephone & Telegraph Co.*, No. 82-124 (Apr. 26, 1983), slip op. 36. New England Telephone filed an enforcement action under Section 401(b), and the United States District Court for the District of Maine issued an injunction instructing the Maine commission to permit the telephone company to use the depreciation practices prescribed by the FCC (Pet. App. 42c-44c).

The First Circuit reversed (Pet. App. 1a-14a). It held that the *Preemption Order* is not an "order" under Section 401(b). The court ruled that only "adjudicative orders," as opposed to orders resulting from rulemaking proceedings, may be enforced under that Section. The court recognized (Pet. App. 11a) that "our interpretation requires reading [order] differently" in Section 401 than this Court read the word "order" in Section 402 (47 U.S.C. 402) in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942). But the court found other argu-

[4] On remand, and after the Fourth Circuit's decision, the district court issued an injunction instructing the Arkansas commission to permit Southwestern Bell to use the depreciation methods prescribed by the FCC for state ratemaking purposes.

ments persuasive. The court concluded that other sections of the Act "use the word 'order' in a way that seems to envision Commission decisions requiring specific actions of specific carriers," while the *Preemption Order* has general applicability (Pet. App. 10a). In the court of appeals' view, Section 401(b) "can be read more fairly and coherently" if "order" is narrowed to permit enforcement actions in district courts only of such specific orders (Pet. App. 9a). Furthermore, as a policy matter, the court thought it desirable to prohibit private parties from enforcing orders of general applicability so that the FCC could itself determine when enforcement actions regarding such orders were needed.

New England Telephone sought rehearing. It argued that its enforcement action could be viewed as an action enforcing a 1982 adjudicative order, *In re Prescription of Revised Percentages of Depreciation* (*1982 Prescription Order*), 92 F.C.C.2d 920 (1982), the type of order that the First Circuit concluded could be enforced by a private party under Section 401(b). The First Circuit issued a supplemental opinion rejecting this argument. It noted that the *1982 Prescription Order* "expressly left open" the issue whether its depreciation rules were preemptive so that it was not accurate to say that New England Telephone sought enforcement of that order (Pet. App. 2b). Furthermore, the court stated, New England Telephone had not made this argument previously, and it "would be unfair to other parties in the case" to accept it on rehearing (*ibid.*).

4. The Louisiana case arose in May 1982, when South Central Bell sought a rate increase that was based in part on application of the FCC's depreciation methods. The Louisiana Public Service Commis-

sion denied the telephone company's request (J.S. App. A99-A101). The Louisiana commission "clearly implied its refusal to implement FCC-prescribed depreciation methods" (*id.* at A10 (footnote omitted)). South Central Bell filed an enforcement action under Section 401(b) in the United States District Court for the Middle District of Louisiana, and that court issued a preliminary injunction ordering the Louisiana commission to permit the telephone company to use the depreciation practices prescribed by the FCC.

The Louisiana commission responded by finding that application of those methods resulted in an increased expense level of $40.5 million. But the Louisiana commission decided, without further proceedings, to reduce the telephone company's rate of return from 13.5% to 12%, so it approved a rate increase of $12.7 million rather than $40.5 million. J.S. App. A10-A11.

The district court then concluded that the Louisiana commission "has not complied with the order of this court" (J.S. App. A55). The court stressed that this commission "received no evidence" before adjusting the rate of return; it instead engaged in "a simple exercise in arithmetic design to minimize the increase in telephone rates" (*ibid.*). The district court modified its injunction by ordering the commission to permit South Central Bell to increase its revenues in order to recover the entire amount the commission had determined was required on account of application of the depreciation practices prescribed by the FCC.

The court of appeals affirmed (J.S. App. A1-A35). It first considered the position adopted by the First Circuit in the Maine case—that the *Preemption Order* is not an "order" under Section 401(b)—and re-

jected it (J.S. App. A17-A23). The court noted that "the First Circuit was not able to cite * * * a single precedent in support of its" narrow interpretation (*id.* at A18). On the contrary, *Ambassador, Inc.* v. *United States*, 325 U.S. 317 (1945), in which the Court assumed that "order" under Section 401 included rulemaking orders, and *Columbia Broadcasting System* v. *United States*, *supra*, in which the Court read "order" under Section 402 to include rulemaking orders, strongly supported the conclusion that the *Preemption Order* is an "order" (J.S. App. A18-A20).

The Fifth Circuit also found the policy justifications underlying the First Circuit's decision unpersuasive. Contrary to the First Circuit, the Fifth Circuit "simply [did] not see how the FCC's responsibility in developing and enforcing a coherent communications policy would be significantly undermined" by reliance on private enforcement of rules (*id.* at A22). Indeed, the court noted that unfairness can result from non-compliance with an administrative rule, and situations exist where only a private party has a sufficient interest to enforce compliance (*id.* at A21-A22). In any event, it also noted, the FCC can "avoid private incursions upon its enforcement responsibilities" by intervening and by filing amicus briefs; and courts may apply the doctrine of primary jurisdiction in order to obtain the FCC's views, when needed (*id.* at A22). Accordingly, the Fifth Circuit held that "the FCC Preemption Order is an order within the meaning of § 401(b)" (*id.* at A23).

The court of appeals also rejected the Louisiana commission's attack on the district court's modified preliminary injunction. Like the district court, the

court of appeals recognized that state commissions have primary authority to set intrastate rates (*id.* at A28). But the court of appeals found that the district court's determination that the Louisiana commission had adjusted the rate of return without further proceedings merely to avoid high telephone rates was not clearly erroneous (*id.* at A30-A31). And the court determined that, since "it is clear that the Preemption Order in prohibiting inconsistent state depreciation practices was intended also to preclude state responses designed to evade the consequences and the purposes of that presumption," the Louisiana commission erred in reducing the rate of return summarily merely to offset increased depreciation expenses (*id.* at A29-A30).

ARGUMENT

In our view, none of the issues raised by these cases warrants the Court's attention. The ultimate issue underlying the disputes between the telephone companies and the state commissions—the validity of the FCC's *Preemption Order*—is not properly presented by any of these cases. That issue is presented by the petitions and jurisdictional statement challenging the Fourth Circuit's affirmance of the FCC's *Preemption Order*. See our Fourth Circuit Opposition. While there is a conflict between the First and Fifth Circuits regarding the type of "order" that may be enforced by private parties under Section 401(b), and while we think that the First Circuit erred in holding that private parties may not enforce orders of the kind involved here, its decision is unlikely to have any important consequences. Nor do we think that the modified preliminary injunction upheld by the Fifth Circuit requires review.

1. None of these three enforcement cases properly presents the issue whether the FCC acted within the scope of its authority in issuing the *Preemption Order*. The Eighth Circuit (Pet. App. A55), the First Circuit (Pet. App. 5a), and the Fifth Circuit (J.S. App. A13) each recognized that, under the Hobbs Act, the Fourth Circuit had exclusive jurisdiction over that issue.[5] That is correct. And, as we argue in our opposition to the Fourth Circuit petitions, that court properly applied settled law in upholding the *Preemption Order*, so there is no need for this Court to review that issue even in the one case that properly presents it—the Fourth Circuit case.

The Arkansas commission nevertheless argues (Pet. 6-19) that the Eighth Circuit should have held the *Preemption Order* ultra vires, and that its refusal to do so is inconsistent with three decisions of this Court, *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973), *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944). But the Arkansas commission is wrong in contending that the Eighth Circuit refused to recognize that courts enforcing orders under Section 401(b) retain equitable power to refuse to enforce those orders. Citing *Hecht Co.* v. *Bowles*, *supra* (Pet. App. A54), the Eighth Circuit held that district courts retain some discretion to refuse to enforce orders under Section 401(b) even when all the statutory requirements for enforcement are met. It instead merely held that, "[u]nder the circumstances of this case, * * * denial of injunctive relief would

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[5] Thus, no error was committed of the sort that occasioned our petition for a writ of certiorari in *ICC* v. *Tri-State Motor Transit Co.*, No. 84-1515 (filed Mar. 25, 1985).

be an abuse of discretion" (Pet. App. A54). In reaching this conclusion, the court of appeals gave particular weight to what it regarded as the Arkansas commission's studied defiance of the FCC's order, even though the state commission could have sought a stay of that order in the Fourth Circuit review proceeding in which it was a party (*ibid.*). Thus, most of the argument in the Arkansas petition misses the mark because the commission has misread the Eighth Circuit's opinion.[6]

2. Despite the conflict in the circuits, we do not think that this Court need consider the issue of what type of "order" may be enforced under Section 401 (b).[7] While, in our view, the First Circuit's decision is erroneous, that decision will probably not have important consequences. In part this is because the First Circuit's holding, as modified on rehearing, should not bar private enforcement actions involving FCC depreciation prescriptions in the future. If we are wrong, the Court may address the issue when a future private enforcement action is barred.

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[6] Moreover, the Fourth Circuit's decision upholding the *Preemption Order*, which followed the Eighth Circuit's decision that the *Preemption Order* cannot be deemed ultra vires, confirms that the Eighth Circuit was correct. Since, in our view, there is no need for this Court to review the Fourth Circuit's decision (see our Fourth Circuit Opposition), which squarely presents the issue of the FCC's preemptive power over depreciation methods, *a fortiori* there is no justification for this Court to consider the issue as presented in the Arkansas case.

[7] The conflict is between the First and the Fifth Circuits. The Arkansas commission did not argue that the *Preemption Order* is not an "order," so the Eighth Circuit did not address the issue.

On the merits, we think the Fifth Circuit has shown that the First Circuit erred in its legal analysis. The First Circuit acknowledged, in its first decision, that its holding necessitated differing interpretations of "order" in Section 401 and Section 402, in light of this Court's decision in *Columbia Broadcasting System* (Pet. App. 11a-12a). In its request for rehearing, New England Telephone noted that the Court in *Ambassador, Inc.* v. *United States, supra*, had assumed that private parties could enforce rulemaking orders. In its supplemental opinion, the First Circuit stated (Pet. App. 2b-3b) that *Ambassador* is distinguishable because it might have involved Section 401(a) rather than Section 401(b), since the Court did not specify which subsection of Section 401 was being construed. But the Fifth Circuit showed that *Ambassador* involved Section 401(b), not Section 401(a). The Fifth Circuit reasoned that, since Section 401(a) authorizes actions to enjoin violation of the Communications Act itself, while Section 401(b) authorizes actions to enforce orders of the FCC, and the suit in *Ambassador* sought to enforce a rule contained in a telephone company tariff, and not to enforce a provision of the Act itself, it must have been brought under Section 401(b) (J.S. App. A18-A19 & n.18).

The First Circuit also erred in its policy analysis. As the Fifth Circuit concluded (J.S. App. A22), federal interests are generally advanced by the availability of private enforcement of FCC orders, including those orders resulting from proceedings similar to those involved in these cases. In cases where that is not so, the agency, by participating as an intervenor or an amicus, and the courts, by invoking the doctrine of primary jurisdiction, can adequately protect federal interests.

But, despite these errors, the First Circuit's decision is not likely to cause harm beyond the loss to the telephone company involved in that case. Its position has not only been rejected by the Fifth Circuit, but by the Fourth Circuit as well (*Chesapeake & Potomac Telephone Co.* v. *Public Service Commission*, 748 F.2d 879 (4th Cir. 1984), petition for cert. pending, No. 84-1362), and we would expect it to be rejected if raised in other circuits. In addition, as the First Circuit itself noted (Pet. App. 3b), private actions seeking enforcement of orders resulting from FCC rulemaking proceedings have been rare. It may be that, after the unusual flurry of litigation resulting from the recent changes in the telephone industry, such actions will again become rare.

In any event, it is not clear to us that the First Circuit's opinion will be troublesome in the future, even in cases brought in that circuit. In its rehearing petition, New England Telephone argued that, even if it could not seek enforcement of the *Preemption Order*, the FCC's *1982 Prescription Order* was specific enough, under the First Circuit's analysis, to qualify as an adjudicative order that it could enforce. The First Circuit gave two reasons for rejecting that argument. One reason, which will not apply in the future, was that it would be unfair to the other parties in the Maine case to permit New England Telephone to raise the argument on rehearing. The other reason was that the *1982 Prescription Order* preceded the *Preemption Order* and "expressly left open the question" whether its prescriptions preempted the states. Starting with the FCC's 1983 *Prescription Order*, however, each depreciation prescription order specifically states that it preempts state rules (see,

e.g., 96 F.C.C.2d at 261-262 n.3). Since the FCC issues depreciation prescription orders for approximately one-third of the nation's major telephone companies each year (*id.* at 260)—after three-way meetings involving the FCC, the telephone company, and a state commission—by the end of this year a depreciation prescription order that expressly states that it has a preemptive effect should be in force for nearly all of the nation's telephone companies. As we read the First Circuit's supplemental opinion, even that Circuit may permit private actions to enforce these prescription orders. Therefore, the issue presented in this case may not arise again, at least not after this year. Since the conflict in the circuits may have no future impact by the time this Court can resolve it, there is no need for review of this issue.[8]

3. The Louisiana commission also contends that the Fifth Circuit erred in upholding the district court's modified preliminary injunction.[9] It char-

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[8] If the Court concludes that it should resolve the conflict between the First and Fifth Circuits on the issue whether the *Preemption Order* is an "order" enforceable under Section 401(b), we submit that it should confine its grant of certiorari to that issue, affirm the Fifth Circuit, and reverse the First Circuit.

[9] The Louisiana commission may not obtain review of this issue by appeal under 28 U.S.C. 1254(2).

First, the injunction at issue is a preliminary injunction. Under *Slaker* v. *O'Connor*, 278 U.S. 188, 189-190 (1929), only "final judgments" are subject to review under Section 1254(2). See *South Carolina Electric & Gas Co.* v. *Flemming*, 351 U.S. 901 (1956). That rule has been questioned (*City of New Orleans* v. *Dukes*, 427 U.S. 297, 301-302 (1976); *City of Chicago* v. *Atchison, T. & S. F. Ry.*, 357 U.S. 77, 82-83 (1958)), but never repudiated. In *Doran* v. *Salem Inn, Inc.*, 422 U.S.

acterizes the district court's action as requiring state commissions to freeze authorized rates of return (J.S. 23). This is simply not so. There is actually

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922, 927 (1975), the Court dismissed an appeal, citing *Slaker*, and noting that the party sought "review of the affirmance of a preliminary injunction." Commentators agree that Section 1254(2), like 28 U.S.C. 1257(2), should be subject to a "final judgment" requirement. 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4037, at 36-39 (1978). In particular, those commentators argue that appellate jurisdiction ought not lie under Section 1254(2) to review "decisions that affirm a preliminary injunction" (*id.* at 38). That position is fortified by this Court's recent statements that statutes authorizing appeals are to be construed narrowly (see, *e.g.*, *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 7; *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 43 (1983)). A narrow construction leads to retention of the final judgment rule of *Slaker*. Since the Louisiana commission challenges a preliminary injunction, rather than a final order, an appeal is not proper.

Second, the district court did not strike down any state statute (see *Silkwood*, slip op. 7-8); it merely ordered the Louisiana Public Service Commission to obey an injunction requiring it to follow the FCC's prescribed depreciation methods. The Louisiana commission cites two cases, *Atchison, T. & S. F. Ry.* v. *Public Utilities Commission*, 346 U.S. 346 (1953), and *Lake Erie & W.R.R.* v. *State Public Utilities Commission*, 249 U.S. 422 (1919), decided under 28 U.S.C. 1257(2), that held that orders of state commissions were "legislative in nature." To be sure, ratemaking has legislative origins, since in the past some state legislatures set utility rates. In light of the policy that statutes authorizing appeals are to be construed narrowly, these decisions, decided under Section 1257(2), ought not be extended to Section 1254(2). See *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (Puerto Rican statute is not a state statute under Section 1254(2)), and *Torres* v. *Puerto Rico*, 442 U.S. 465, 468 (1979) (appeal lies under Section 1257(2) to review a

very little difference between the parties on any question of importance in the future. The only real issue is whether the Louisiana commission followed the district court's original preliminary injunction. We think that it is clear that the Louisiana commission flouted the court's order, necessitating the modified injunction as a remedial action by the district court to vindicate its own original order.

The Louisiana commission complains (J.S. 21) that "[t]he FCC never suggested that the *Preemption Decision* could bind a state commission to a previously authorized rate of return," implying that the FCC has changed its position. The FCC has not changed its position and agrees with the Louisiana commission that a state commission may adjust its authorized rate of return in light of the adjustment of other factors, including depreciation practices, that affect investor risk. Thus, there is no disagreement that primary authority over intrastate ratemaking lies with state commissions. The FCC's interest is in requiring adoption of depreciation methods that insure accurate allocation of costs so that telephone companies will replace equipment when, in economic reality, it is efficient to do so. The FCC is not in the business of setting intrastate telephone rates.

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decision upholding a Puerto Rican statute). There is no good reason to characterize ratemaking orders as state statutes under Section 1254(2). Unlike statutes, they are not codified and are generally transitory in nature, reflecting changes in economic conditions. Accordingly, this Court should not extend the meaning of "state statute" under Section 1254(2) to include ratemaking orders.

Should the Court disagree with our submission that an appeal does not lie in No. 84-870, it should affirm the judgment for the reasons stated in this brief.

The FCC and the Louisiana commission disagree only on the specific question of whether the state commission's abrupt adjustment of the rate of return in this case was correctly characterized as disobedience to the district court's injunction, rather than as a separate ratemaking decision. We think the Fifth Circuit's opinion makes clear that it was properly found to be the former. The state commission held no hearings and considered no new evidence before adjusting the rate of return (J.S. App A31). It presented its argument that the adjustment was warranted in light of reduced investor risk caused by the change in depreciation practices for the first time in its reply brief in the court of appeals (*ibid.*). In these circumstances, the district court did not abuse its discretion by modifying its injunction so as to effectuate its previous order. In any event, whether, under the peculiar facts of this case, the district court correctly determined that the Louisiana commission was improperly evading compliance with the court's injunction is not a question warranting review by this Court.[10]

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[10] The Louisiana commission's other arguments also do not warrant review by this Court. The Johnson Act, 28 U.S.C. 1342, does not foreclose federal court jurisdiction in this case because jurisdiction is not based on diversity or on a claim that the state's rate order was unconstitutional, but on a federal statute expressly authorizing the district court to act (J.S. App. A33 n.28). There is, finally, no basis for the argument that state commissions are exempt from enforcement actions under Section 401(b) on grounds that they are not "persons." The definition of "persons" in the Act is broad and inclusive (47 U.S.C. 153(i)). No court of appeals has accepted this argument, and thus there is no conflict at that level for this Court to resolve.

CONCLUSION

The Court should dismiss the appeal in No. 84-870 for want of jurisdiction and treat the papers on which that appeal was filed as a petition for a writ of certiorari pursuant to 28 U.S.C. 2103. The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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